TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 7

WILBURN BOAT COMPANY, ET AL., PETITIONERS,

vs.

FIREMAN'S FUND INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1953

CERTIORARI GRANTED APRIL 26, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1954.

—5626

[fol. a-1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

Civil Action No. 503

WILBURN BOAT COMPANY, a corporation, doing business in Grayson County, Texas, and incorporated under the laws of the State of Oklahoma, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, residents of Grayson County, Texas, Plaintiffs,

vs.

FIREMAN'S FUND INSURANCE COMPANY, an insurance company doing business in Dallas County, Texas, and incorporated under the laws of the State of California, Defendant

PETITION FOR REMOVAL OF A CIVIL ACTION—Filed July 15, 1949

The Petition of Fireman's Fund Insurance Company, a corporation, Defendant in the above-entitled action, respectfully shows:

1. That an action of a civil nature was instituted by the Plaintiffs against the Petitioner in the 59th District Court of Grayson County, Texas, being Action Number 57400. Purported service of process was made upon the Petitioner on the 27th day of June, 1949.

2. That at the time said action was filed, the Plaintiff, Wilburn Boat Company, was a corporation organized and existing under the laws of the State of Oklahoma and not of the State of California, and upon information and belief still is so organized and existing, and that said Wilburn Boat Company is a citizen and resident of the State of Oklahoma and not of the State of California; that Glenn Wilburn, Frank Wilburn and Henry Wilburn, at the time said action was filed, were citizens and residents of the [fol. 3] State of Texas, and upon information and belief

still are citizens and residents of said State and not of the State of California.

3. That at the time said action was filed, and ever since, your Petitioner has been and still is a corporation organized and existing under the laws of the State of California and not of the State of Texas, nor of the State of Oklahoma, and was then, and still is, a citizen and resident of the State of California and not of the State of Texas, nor of the State of Oklahoma.

4. Said action is of a civil nature, in which there is a controversy between a citizen and resident of the State of Oklahoma, the said Wilburn Boat Company, a corporation, and citizens and residents of the State of Texas, the said Glenn Wilburn, Frank Wilburn and Henry Wilburn on the one hand, and on the other hand, a citizen and resident of the State of California, the Petitioner, Fireman's Fund Insurance Company, and the matter in controversy in such action, exclusive of interest and costs, exceeds the sum of $3,000.00, to-wit: the Plaintiffs have alleged a purported contract of insurance in the amount of $40,000.00, and allege a purported loss thereunder in the sum of $40,00-.00, with interest thereon at the rate of Six Per Cent (6%) per annum from May 23, 1949.

5. The only process, pleadings or orders in said action in the 59th District of Court of Grayson County, Texas, purporting to have been served upon your Petitioner are a Summons or Citation and a copy of Plaintiffs' Petition True copies of said Summons or Citation and Plaintiff's Petition are filed in this Court, together with this Petition, [fol. 4] pursuant to the terms of Section 1446 of Title 28 of the United States Code.

6. The Petitioner files herewith a Bond, with good and sufficient surety, conditioned that the Petitioner will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the same was not removable, or was improperly removed.

Wherefore, your Petitioner, Fireman's Fund Insurance Company, a corporation, prays that the Civil Action instituted by the Plaintiff against your Petitioner in the 59th District Court of Grayson County, Texas, as Act-on Number 57400, as aforesaid, be removed from that Court to the

District Court of the United States, for the Eastern District of Texas, Sherman Division.

J. A. Gooch, (S.) Edward B. Hayes, 135 South La-Salle Street, Chicago, Illinois. J. A. Gooch, Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Petitioner and Defendant.

* * * * * * *

[fol. 5] In United States District Court for the Eastern District of Texas, Sherman Division

[Title omitted]

Removal Bond—Filed July 15, 1949

Know All Men By These Presents, that Fireman's Fund Insurance Company, a corporation, as Principal, and Fireman's Fund Indemnity Company, as Surety, are held and firmly bound unto Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, their heirs, executors, administrators and assigns, in the penal sum of Five Hundred Dollars ($500.00), for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents, on the condition, nevertheless, that:

Whereas, the above-named Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, as Plaintiffs, heretofore brought a Civil Action in the 59th District Court of Grayson County, Texas, against said Principal, as Defendant, being Action No. 57400 in said Court; and

[fol. 6] Whereas, the said Principal is filing its Verified Petition in the District Court of the United States, for the District and Division in which said suit is pending, to-wit: the 59th District Court of Grayson County, Texas, to remove said suit to said District Court of the United States, in accordance with the provisions of Title 28, United States Code;

Now, therefore, the condition of this obligation is such

that if the Principal shall pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that the case was not removable, or was improperly removed, then this obligation shall be void; but otherwise it shall remain in full force and effect.

In witness whereof, the said principal has caused these presents to be executed by one of its duly authorized Attorneys of Record in this Court, and the said Fireman's Fund Indemnity Company has caused these presents to be signed by its Attorney in Fact, and its corporate seal to be affixed hereto, this 15th day of July, A. D. 1949.

Fireman's Fund Insurance Company, a corporation, Principal, by J. A. Gooch, its duly authorized Attorney of Record in this Court. Fireman's Fund Indemnity Company, a corporation, Surety, by Andrew K. Miller, Jr., its Attorney in Fact. (Seal)

[fol. 7] Attached Power of Attorney omitted.)

* * * * * * *

In United States District Court for the Eastern District of Texas, Sherman Division

[Title omitted]

Removal Notice—Filed July 15, 1949

To the Clerk of the District Court of the United States, for the Eastern District of Texas, Sherman Division:

Attached hereto, for filing pursuant to the provisions of Section 1446 of Title 28, United States Code, are true copies of the Summons or Citation and Petition purported to have [fol. 8] been served upon the Defendant in the Civil Action instituted in the 59th District Court of Grayson County, Texas, entitled: "Wilburn Boat Company, et al. vs. Fireman's Fund Insurance Company," Action Number 57409 in said Court.

J. A. Gooch, Edward B. Hayes, 135 South LaSalle Street, Chicago, Illinois; J. A. Gooch, Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Petitioner and Defendant.

IN UNITED STATES DISTRICT COURT

ORIGINAL COMPLAINT—Filed June 18, 1949

Now come Wilburn Boat Company, a corporation duly incorporated under the laws of the State of Oklahoma, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, resident citizens of Grayson County, Company, a corporation duly incorporated under the laws of the State of California and with an office and place of business and agent upon [fol. 9] whom service may be had in the Wilson Building, in Dallas, Dallas County, Texas, and allege:

1

Plaintiffs show to the Court that on or about May 22, 1947, the defendant issued its insurance policy Number YA-28579, insuring the owners of a certain yacht called "The Wanderer" against loss or damage due to fire or other hazards, to the extent of $40,000.00, and thereafter the plaintiffs herein, Glenn Wilburn, Frank Wilburn and Henry Wilburn, purchased said yacht and said policy was indorsed to protect them against loss or damage of or to said yacht. Thereafter an Oklahoma corporation was formed, to-wit, Wilburn Boat Company, and the title to said yacht was conveyed to said corporation, of which the said Glenn Wilburn, Frank Wilburn and Henry Wilburn were and at all times since its organization have been the sole stockholders. An application for indorsement on said policy to cover Wilburn Boat Company was made and issued by the defendant herein, although it inadvertently listed it as "Glenn, Frank and Henry Wilburn d/b/a Wilburn's Boat Company."

At about 12:30 A. M. on the 25th day of February, 1949, while said policy was in full force and effect, a fire of unknown origin was discovered on said yacht and said fire caused damage to said yacht to the extent of $75,000.00.

The plaintiffs herein have duly complied with all of the provisions of said policy and all conditions precedent, including the furnishing of proof of loss to the defendant, [fols. 10-11] but the defendant has denied all liabilities for the payment of the damages involved in said fire.

Wherefore, plaintiffs pray that upon trial of this case

they have judgment against the defendant, Fireman's Fund Insurance Company, for the sum of $40,000.00, with interest at the rate of 6% per annum from May 23, 1949, and for all other relief, general or special, to which they may be entitled.

(S.) Alexander Gullett, Gullett & Gullett, Attorneys at Law, Security Building, Denison, Texas; (S.) Hobert Price, Strasburger, Price, Holland, Kelton & Miller, 300 Gulf States Building, Dallas 1, Texas, Attorneys for plaintiffs:

Citation and sheriff's return (omitted in printing).

[fol. 12] IN UNITED STATES DISTRICT COURT

REMOVAL NOTICE—Filed July 15, 1949

To Alexander Gullett (Gullett & Gullett) Security Building, Denison, Texas; Hobert Price (Strasburger, Price, Holland, Kelton & Miller) 300 Gulf States Building, Dallas 1, Texas, Attorneys for Plaintiffs:

Please take notice that we have this 15th day of July, A. D. 1949, filed a Petition in this Court in behalf of the Defendant, Fireman's Fund Insurance Company, for removal of the action now pending in the 59th District Court of Grayson County, Texas, entitled: "Wilburn Boat Company et al. vs. Fireman's Fund Insurance Company," Action Number 57400, to this Court; and

Further take notice that we have at the same time filed in this Court a Bond, with good and sufficient surety, conditioned that the aforesaid defendant, Fireman's Fund Insurance Company, will pay all costs and disbursements incurred by reason of the removal proceeding, should it be determined that the case was not removable, or improperly removed, and at the same time have filed in this Court copies of the Summons or Citation purported to have been served upon the aforesaid Defendant in said action.

Further take notice that we filed a copy of said Petition for Removal, this date, with the Clerk of the 59th District Court of Grayson County, Texas.

[fol. 13] Copies of said Petition for Removal and Removal bond are attached to this Notice and herewith served upon you.

(S.) J. A. Gooch, Edward B. Hayes, J. A. Gooch, Cantey, Hanger, Johnson, Scarborough & Gooch,

Sinclair Building, Fort Worth, Texas, Attorneys for Petitioner and Defendant.

(Copies of Petition for Removal and Removal Bond, are omitted).

[fol. 14] In United States District Court for the Eastern District of Texas, Sherman Division

[Title omitted]

Affidavit as to Service of Notice to Clerk, 59th District Court of Grayson County, Texas—Filed July 15, 1949

State of Texas,
County of Tarrant, ss:

Nat. J. Harben, being first duly sworn, on oath deposes and says that he is one of the Attorneys for the Defendant in the above-entitled action; that on July 15, 1949, he filed with the Clerk of the 59th District Court of Grayson County, Texas, a true copy of the Petition for Removal of a Civil Action heretofore filed in this Court on July 15, 1949, in accordance with the provisions of Section 1446 of Title 28, United States Code.

Nat. J. Harben.

[fol. 15] (Acknowledgement Omitted.)

Subscribed and Sworn to before me this 15th day of July, A. D. 1949.

James P. Riley, Notary Public.

(Seal)

IN UNITED STATES DISTRICT COURT

STIPULATION FOR EXTENSION OF TIME TO FILE MOTIONS AND ANSWER—Filed July 15, 1949

Whereas, the within proceeding was filed in the 59th District Court of Grayson County, Texas, entitled Wilburn Boat Company et al. vs. Fireman's Fund Insurance Company, being Cause No. 54709, and defendant having filed removal papers herein to remove said case to the District Court of the United States for the Eastern District of Texas, Sherman Division, and said papers having been filed on July 15, 1949; and

Whereas, defendant's time to appear and answer herein or to file any defensive motions will expire on July 20, 1949, and defendant being unable to prepare its answer and defense in said cause within the aforesaid time has requested an extension of time to answer or file any defensive motions, or otherwise move, to and including August 10, 1949, and [fol. 16] plaintiffs having agreed to such extension of time:

It Is, Therefore, Stipulated and Agreed by and between the attorneys for the plaintiffs and attorneys for the defendant that defendant's time to answer or file any defensive motions, or otherwise move, in the within entitled proceeding be and is hereby extended to and including August 10, 1949.

It is further agreed that this agreement is without prejudice to plaintiff's right to file any motions herein with respect to the removal of said cause to the United States District Court and is without prejudice to defendant's right to file any motions herein.

It is further agreed that this agreement is subject to ap-

proval of the Court, and both parties move that the Court approve this agreement.

Dated: July 15, 1949.

Gullett & Gullett, By (S.) Alexander Gullett, Security Building, Denison, Texas, one of the attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By (S.) J. A. Gooch, 1500 Sinclair Building, Fort Worth 2, Texas, Attorneys for Defendant.

[fol. 17] In United States District Court

Order Extending Time for Filing Motions and Answer—July 15, 1949

Defendant, Fireman's Fund Insurance Company, having moved this Court by and through its attorneys, Cantey, Hanger, Johnson, Scarborough & Gooch, for an order extending defendant's time to file its answer or make any motions, or otherwise move, in the above entitled proceeding, to and including August 10, 1949, and the Court having read the agreement entered into by and between the attorneys for defendant and plaintiffs, wherein it is agreed that said extension of time be granted, and said agreement having been filed among the papers in this proceeding, and the Court being of the opinion that said motion should be granted:

It Is, Therefore, Ordered that the time for defendant, Fireman's Fund Insurance Company, to file its answer and any defensive motions, or otherwise move in the within and entitled proceeding, be and hereby is extended to and including August 10, 1949; and

It Is Further Ordered that the aforesaid extension of time shall be without prejudice to plaintiffs' right to file any motions herein with respect to the removal of said case to the United States District Court and is without prejudice to defendant's right to file any motions herein.

[fol. 18] Done at Sherman, Texas, July 15, 1949.

(S.) Randolph Bryant, United States District Judge.

Approved as to Form and Substance: Gullett & Gullett, By (S.) Alexander Gullett, Security Building, Denison,

xas, One of the Attorneys for the Plaintiffs. Cantey, ager, Johnson, Scarborough & Gooch, By (S.) J. A. ch, 1500 Sinclair Building, Fort Worth 2, Texas, Attor- s for Defendant.

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l. 19] IN UNITED STATES DISTRICT COURT

(Title Omitted)

SECOND STIPULATION FOR EXTENSION OF TIME TO FILE MOTIONS AND ANSWER—Filed Aug. 5, 1949

Whereas, the within proceeding was filed in the 59th Dis- t Court of Grayson County, Texas, entitled Wilburn at Company et al. vs. Fireman's Fund Insurance Com- y, being Cause No. 57400, and defendant having filed oval papers herein to remove said case to the District rt of the United States for the Eastern District of as, Sherman Division, and said papers having been filed July 15, 1949; and

Whereas, defendant's time to appear and answer herein to file any defensive motions was heretofore extended greement and order of the Court to and including Au- t 10, 1949, and defendant having been unable to complete investigation of said case and being unable to file its wer on or before August 10, 1949, has requested another nsion of time to prepare and file any defensive motions its answer herein to and including August 25, 1949, and

l. 20] plaintiffs having agreed to said extension of time:

is, Therefore, Stipulated and Agreed by and between attorneys for the plaintiffs and attorneys for the defend- that defendant's time to answer or file any defensive ions, or otherwise move, in the within entitled proceed- be and is hereby extended to and including August 25, 9.

t is further agreed that this agreement is without preju- e to plaintiff's right to file any motions herein with re- et to the removal of said case to the United States Dis- t Court and is without prejudice to defendant's right to any motions herein.

t is further agreed that this agreement is subject to

approval of the Court, and both parties move that the Court approve this agreement.

Dated: August 5, 1949.

Gullett & Gullett, By Alexander Gullett, Security Building, Denison, Texas, one of the attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By Nat J. Harben, 1500 Sinclair Building, Fort Worth 2, Texas, Attorneys for Defendant.

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fol. 21] IN UNITED STATES DISTRICT COURT

SECOND ORDER EXTENDING TIME FOR FILING MOTIONS AND ANSWER—August 5, 1949

Defendant, Fireman's Fund Insurance Company, having moved this Court by and through its attorneys, Cantey, Hanger, Johnson, Scarborough & Gooch, for an order extending defendant's time to file its answer or make any motions, or otherwise move, in the above entitled proceeding, to and including August 25, 1949, and the Court having read the agreement entered into by and between the attorneys for defendant and plaintiffs, wherein it is agreed that said extension of time be granted, and said agreement having been filed among the papers in this proceeding, and the Court being of the opinion that said motion should be granted:

It Is, Therefore, Ordered that the time for defendant, Fireman's Fund Insurance Company, to file its answer and any defensive motions, or otherwise move in the within entitled proceeding, be and hereby is extended to and including August 25, 1949; and

It Is Further Ordered that the aforesaid extension of time shall be without prejudice to plaintiffs' right to file any motions herein with respect to the removal of said case to the United States District Court and is without prejudice to defendant's right to file any motions herein.

[fol. 22] Done at Sherman, Texas, August 5, 1949.

(S.) Rudolph Bryant, United States District Judge.

Approved as to Form and Substance: Gullett & Gullett, (Alexander Gullett), Denison, Texas, One of the Attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By Nat J. Harben, 1500 Sinclair Building, Fort Worth 2, Texas, Attorney for Defendant.

In United States District Court

Answer—Filed August 24, 1949

Now comes Fireman's Fund Insurance Company, a corporation, defendant herein, and, answering the petition of the plaintiffs heretofore filed in the above-entitled action, says:

1. In answer to the first literary paragraph of that portion of the petition designated "1", defendant admits that [fol. 23] on or about May 22, 1947, it issued its marine hull insurance policy Number YA-28579 in the amount of $10,000.00 in favor of Robert D. Marshall and John Shuler as their respective interests may appear as owners of a certain yacht called "Wanderer," a vessel of the United States of America, Official Number 231,171, but states that the risks insured against were only those risks specified in said policy or contract of insurance and subject to the terms, conditions, declarations and stipulations therein stated and set forth and not otherwise; that said policy originally provided that it was warranted by the assured that the vessel be confined to the Yacht Harbor, Greenville, Mississippi; that said waters are part of the navigable waters of the United States of America; that by amendment effected by an indorsement or rider attached to the fact of said policy dated July 2, 1948, it was provided among other things that it was warranted by the assured that the vessel be confined to Lake Texoma; that said waters are part of the navigable waters of the United States of America; that said policy of insurance provided in part as follows: "Not valid unless countersigned by a duly authorized Agent of the Company"; that said policy of insurance and all indorsements or riders thereto, including all indorsements or riders hereinafter more specifically referred to, were issued by the defendant at Chicago, Illinois, and countersigned in accordance with the provision above stated at Rock Island, Illinois, and were delivered in each instance to the named assured at Rock Island, Illinois.

By amendment effected by an indorsement or rider attached to the face of said policy dated July 2, 1948, among [fol. 24] other things the assured under said policy was changed as follows: "Effective June 9, 1948, it is understood and agreed that the name and address of the Assured hereunder is amended to read: Frank and Henry Wilburn d/b/a Wilburn Bros. Denison, Texas."

By amendment effected by an indorsement or rider attached to the face of said policy dated August 16, 1948, among other things the assured under said policy was changed as follows: "Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read: Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company."

Subsequently, to wit: on or about the 14th day of December, 1948, the named assured by their duly authorized agent thereunto represented to the defendant that said named assured had an investment of $4,000.00 in said vessel and requested insurance in the additional amount of $30,000.00. By reason of said representation and in reliance thereon, by amendment effected by an indorsement or rider attached to the face of said policy dated December 20, 1948, the amount of insurance coverage under said policy was changed as follows: "In consideration of an additional premium of $234.01 it is understood and agreed that the amount of insurance hereunder is increased to $40,000.00." Upon information and belief defendant avers that at no time here in question did the plaintiffs or any of them have an investment of $40,000.00 in said vessel but that the total investment that the plaintiffs or any of them had in said vessel at any time here in question was in a total amount greatly less than $40,000.00, which said amount is peculiarly within the knowledge [fol. 25] of the plaintiffs.

Except as herein expressly admitted the averments of the first literary paragraph of that portion of the petition designated "1" are denied.

2. In answer to the second literary paragraph of that portion of the petition designated "1", defendant admits that said yacht was damaged by fire on or about the 25th day of February, 1949. Except as herein expressly admitted, the averments of said second literary paragraph of said portion of the petition are denied.

3. In answer to the third literary paragraph of that portion of the petition designated "1", defendant denies that the plaintiffs have duly complied with all of the provisions of said policy issued as aforesaid, denies that the plaintiffs have duly complied denies that the plaintiffs have furnished the defendant with a sworn proof of loss as required by the terms and conditions of said policy.

Further answering, defendant states that the named assured in the policy of insurance sued upon herein rendered said policy null and void in each of the following separate and several instances:

(A). Defendant avers that among other things said policy expressly provides:

"It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous con- [fol. 26] sent in writing of the Assurers."

As hereinbefore stated, effective August 6, 1948, the named assured under the policy sued upon was Boat Company. Upon information and belief, defendant avers that subsequently, to-wit: on or about September 24, 1948, said Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company transferred and sold all their right, title and interest in said vessel to Wilburn Boat Company, a corporation organized and existing under the laws of the State of Oklahoma. Upon information and belief, defendant further avers that on or about August 4, 1948, Wilburn Brothers Boat Company by J. — Wilburn and J. F. Wilburn transferred said yacht "Wanderer" to The Citizens National Bank of Denison, Texas, a corporation, as security for an indebtedness in the amount of $10,000.00 as evidenced by a certain promissory note dated August 4, 1948, and that subsequently, to-wit: on or about October 21, 1948, Wilburn Brothers Boat Company, a corporation suing herein as the plaintiff Wilburn Boat Company, a corporation, transferred said yacht "Wanderer" to The Citizens National Bank of Denison, Texas, a corporation, as evidenced by a certain chattel mortgage dated October 21, 1948, which said chattel mortgage recites among other things as follows:

"It is hereby understood and agreed that this mortgage and note described herein are given in renewal and extension of a certain mort-age and note dated August 4, 1948, in the amount of $10,000.00 payable ninety days from date, signed Wilburn Brothers Boat Company by J. — Wilburn, and J. F. Wilburn.";

[fol. 27] That the consent of the defendant was not asked and was not given to any of the transactions hereinbefore stated or to any sale, assignment, transfer or pledge of the interest insured by said policy; that said policy expressly provides as aforesaid that upon such sale, assignment, transfer or pledge it is agreed that this insurance is void. Defendant is now advised and therefore states that in the premises the said policy was void at the time of the alleged loss. Defendant further shows that the fact that the named assured did sell the interest insured to the Wilburn Boat Company, a corporation, was material to the risk and hazard assumed by the defendant (as also appe-rs from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void. Defendant further shows that the fact that the interest insured was transferred as security for a certain indebtedness to The Citizens National Bank of Denison, Texas, a corporation, was material to the risk and hazard assumed by the defendant (as also appears from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void.

(B). Defendant avers that among other things said policy expressly provides:

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorsement hereon."

[fol. 28] Upon information and belief, defendant further avers that the plaintiffs Glenn Wilburn, Frank Wilburn and Henry Wilburn purchased the yacht "Wanderer" at Greenville, Mississippi on or about June 8, 1948, for the consideration of $9,000.00; that subsequently said yacht was brought

by said plaintiffs via the Mississippi and Red Rivers to Lake Texoma for the -mercial purposes; that certain repairs and modifications were then made thereon for the express purpose of operating said yacht for commercial purposes; that the plaintiff Wilburn Boat Company, a corporation, was organized for the express purpose of operating said yacht for commercial purposes; that the articles of incorporation of said corporation verified the 10th day of July, 1948, provided among other things as follows:

"Article Four:

"The purposes for which this corporation is formed are:

"Buy, own, lease, mortgage and sell real and personal property necessary to carry on business of corporation; and to operate an excursion boat for purpose of hauling mail, freight and passengers to and from all sites and concessions designated by Regional Director of National Park Service on shores of Lake Texoma, and to render additional service to towing, winching, and salvaging and repairing boats."; that the plaintiffs entered into and set up certain charters for the commercial use of said yacht. Defendant did not consent thereto and did not consent to the use of said vessel [fol. 29] for any commercial purpose whatsoever. Defendant is advised and therefore states that in the premises the said policy was void at the time of the alleged loss. And defendant further shows that the fact that said yacht was chartered and not used solely for private pleasure purposes was material to the risk and hazard assumed by the defendant (as also appears from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void.

(C). Defendant avers that among other things said policy expressly provides:

"This Entire Policy shall be void if the Assured has concealed or misrepresented any material fact subject thereof, or, in case of fraud or false swearing insurance or the subject thereof; whether before or by the Assured touching any matter relating to this after a loss."

Defendant hereby refers to and hereby incorporates subparagraphs (A) and (B) hereof with the same force and effect as though here repeated. Defendant further avers that the transactions and matters therein stated and referred to were concealed by the plaintiffs and were not disclosed to the defendant; that the defendant had no knowledge of any of said transactions or matters or of any of the facts pertaining thereto until after the date of the alleged loss.

Further answering, defendant says that as soon as it received notice of the transactions and matters hereinbefore [fol. 30] referred to, defendant notified the named assured by registered mail posted on or about May 12, 1949, that by reason of the aforesaid premises among other things said policy was rendered null and void and accompanied such notification with a tender of the full and entire premium paid by the named assured for said policy.

Wherefore, defendant says that by reason of the aforesaid premises said policy of insurance was null and void at the date of the alleged loss and that the plaintiffs have no rights thereunder and defendant prays that plaintiffs' petition should be dismissed at plaintiffs' costs.

J. A. Gooch, 1500 Sinclair Bldg., Ft. Worth, Texas. Edward B. Hayes, 135 South La Salle Street, Chicago, Illinois. (Not Signed), Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Defendant.

[fol. 31] In United States District Court for the Eastern District of Texas, Sherman Division

Civil Action No. 503

Wilburn Boat Company, a corporation, et al., Plaintiffs,

vs.

Fireman's Fund Insurance Company, a corporation, Defendant

Judgment—December 13, 1951

This cause came on regularly to be heard in open Court by the Court, Honorable Randolph Bryant presiding on December 28th, 1949. All parties announced ready for trial and the case proceeded to trial before the Court without a jury on the pleadings, exhibits, evidence and arguments of counsel, at the conclusion of which the Court invited the respective parties to submit written briefs concerning their respective contentions.

Thereafter, and pending the preparation of briefs, the trial proceedings were transcribed by the Official Court Reporter under certificates of January 4th, 1950, and February 18th, 1950, said transcript of trial proceedings being furnished to the Court and to counsel for the respective parties. Thereafter, the defendant, Fireman's Fund Insurance Company, a corporation, filed its brief entitled "Memorandum for Defendant" and, at a later date, the plaintiffs, Wilburn Boat Company, a corporation, and Glenn, Frank and Henry Wilburn, filed their brief entitled "Pl-intiffs' Reply Brief". [fol. 32] Upon consideration of the pleadings, exhibits, evidence, arguments of counsel, transcript of trial proceedings and briefs filed by the respective parties, the Court thereafter, on December 28th, 1950, made its findings of fact and conclusions of law, same being in words, characters and figures as follows:

"United States District Court, Eastern District of Texas

Sherman, Texas, December 28, 1950.

Randolph Bryant, U. S. District Judge,

"Lord Bissell & Kadyk, Attorneys at Law, 135 S. LaSalle St., Chicago 3, Ill.

Honorable Joe A. Keith, Attorney at Law, Sherman, Texas.

Gullett & Gullett, Attorneys at Law, Denison, Texas.

Strasburger Price Holland, Kelton & Miller, Gulf States Bldg., Dallas, Texas.

Honorable T. G. Schirmeyer, Gulf Bldg., Houston, Texas.

"Re: Civ. 503 Sherman Division Wilburn Boat Company

v.

Fireman's Fund Insurance Company

"Gentlemen:

"After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime con- [fol. 33] tract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States.

"Since the policy contained an express provision 'that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assi-ned, transferred pledged without the previous consent in writing of the assurers', and since it is admitted that the assureds were Glenn, Frank and Henry Wilburn, and that they did assign there interest in the vessel to an Oklahoma corporation, and since it is further admitted that they pledged the vessel to the Denison bank, a failure of performance of the terms of the contract is indisputably shown, and for such reason they are not entitled to recover.

"Further, it was 'warranted by the assureds that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorse-

ment hereon'. The record shows without dispute, that this warranty was violated and that no permission was ever granted by indorsement on the policy for use other than for private pleasure purposes.

"I think that the authorities are clear to such effect. Aetna Insurance Company vs. Houston Oil and Transport Company, 49 F. 2d 121 at page 124; Imperial Fire Insurance Company vs. Coos County, 151 U. S. 452; Union Fish Company vs. Erickson, 248 U. S. 308 at page 313.

[fol. 34] "Inasmuch as the above findings, in my opinion, are determinative of the issues in this case, I do not think it is necessary to make any other findings of fact, and attorneys for the defendant may prepare findings of fact and conclusions of law in accordance with the above, as well judgment pursuant thereto, furnishing attorneys for plaintiffs with a copy of such proposed findings, conclusions and judgment.

Yours very truly, (S.) Randolph Bryant".

Said findings and conclusions were sent to each of the addressees named therein, said addressees being all of the attorneys for the respective parties herein, and were also filed by the Judge with the Clerk, all on December 28, 1950.

Thereafter, on or about the 24th day of April, 1951, the Honorable Randolph Bryant died. The undersi-ned is the successor to the Honorable Randolph Bryant and is the Judge regularly sitting in and assigned to the Court in which this action was tried.

Upon consideration of the record, it is the opinion should be rendered against the plaintiffs and in favor of the defendant.

It is, therefore, Ordered, Adjudged, and Decreed by the Court that the plaintiffs, Wilburn Boat Company, Glenn Wilburn, Frank Wilburn and Henry Wilburn, do have and recover nothing of and from the defendant, Fireman's Fund Insurance Company, a corporation; that the whole of the complaint herein be, and it is hereby, dismissed; and that the costs hereof be, and they are hereby, taxed against said plaintiffs, for which let execution issue.

[fol. 35] Dated this 13th day of December, 1951.

(S.) Joe W. Sheehy, Judge.

Filed Dec. 13, 1951.

In United States District Court

[Title omitted]

Notice of Appeal—Filed December 20, 1951

Notice is hereby given that the plaintiffs herein, Wilburn Boat Company, a corporation and Glenn Wilburn, Frank Wilburn and Henry Wilburn, hereby appeal to the United States Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on December 13, 1951.

Gullett & Gullett, Citizens Bank Building, Denison, Texas; Hobert Price, 300 Gulf States Building, Dallas 1, Texas; Theodore G. Schirmeyer, 2801 Gulf Building, Houston 2, Texas, by Alexander Gullett, Attorneys for Plaintiffs and Appellants.

[fol. 36] In United States District Court

Designation of Contents of Record on Appeal—Filed December 20, 1951

Come now the appellants, Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, and designate as the record of this case on appeal the complete record and all the proceedings and evidence in the action.

Gullett & Gullett, Citizens Bank Building, Denison, Texas; Hobert Price, 300 Gulf State Building, Dallas 1, Texas; Theodore G. Schirmeyer, 2801 Gulf Building, Houston 2, Texas, by Alexander Gullett, Attorneys for Plaintiffs and Appellants.

Certificate of Service—(Omitted in Printing)

[fol. 37] Bond on Appeal for $250.00, filed December 26, 1951—omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER AS TO ORIGINAL EXHIBITS—January 11, 1952

The Court being of the opinion that the original exhibits which were introduced in evidence upon the trial of this cause should be sent to the Appellate Court in lieu of copies, It Is Therefore Ordered that the original exhibits in this cause be sent by Registered Mail, in their original form, to the Clerk of the Court of Appeals for the Fifth Circuit, in New Orleans. It Is Further Ordered that such exhibits be mailed or sent along with the record in this case. When [fol. 39] the appeal in this case has been finally disposed of, then the original exhibits shall be returned to the Clerk of the United States District Court, at Sherman, Texas, in order that they may be delivered to the parties for whom they were introduced in evidence.

Entered this 11 day of January, A. D. 1952.

(S.) Joe W. Sheehy, United States District Judge.

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* * * * * * *

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

[Title omitted]

TRANSCRIPT OF TRIAL PROCEEDINGS—Filed January 11, 1950

APPEARANCES

For the Plaintiffs:

Mr. Hobart Price, Dallas, Texas.

Gullett & Gullett, Denison, Texas, by Messrs. Alexander Gullett and Charles S. Gullett.

[fol. 40] For the Defendant:

Mr. Joe A. Keith, Sherman, Texas.

Mr. Edward B. Hayes, Chicago, Illinois.

CASE CALLED FOR TRIAL

Be It Remembered, that upon the 28th day of December, A. D. 1949, came on to be heard the above entitled and num-

bered cause before His Honor, Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, situated and holding Regular Session in the City of Sherman, Texas; and,

That the following is a substantially true and correct transcript of the evidence and proceedings had during the trial of said cause, with the exception that Plaintiffs' Exhibit 4, being a deposition, is omitted herefrom at the request of counsel.

STIPULATION OF FACTS, ETC.

It is stipulated between the parties that the Boat Wanderer was not used solely for private pleasure purposes during its ownership from time to time by the several plaintiffs herein, but on the contrary said boat was purchased with the intention of being chartered and used for hire, was remodeled and reequipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by J. F., J. H., and L. G. Wilburn until it sank as the result of being burned by fire on February 25, 1949. During January, 1949, the boat was damaged as the result of a storm. It was taken from its regular mooring at Burns Run Resort to Lake [fol. 41] Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. After being so returned to Burns Run Resort the boat was not thereafter used for any purpose until it sank as the result of being burned by fire on February 25, 1949.

It is further stipulated by the parties that on June 3, 1948, the plaintiffs, J. F., J. H., and L. G. Wilburn, borrowed $10,000.00 from the Citizens National Bank of Denison, Grayson County, Texas, executing their negotiable promissory note in favor of said bank. Thereafter, on August 4, 1948, Wilburn Bros. Boat Company, acting by J. F. Wilburn and J. H. Wilburn borrowed an additional $10,000.00 from said bank, executing their negotiable 90 day promissory note therefor, being Exhibit 1 attached to this stipulation.

The boat involved in this case, the Wanderer, was pledged

to said bank by said Wilburn Bros. Boat Company, acting as aforesaid, by chattel mortgage of August 4, 1948, being Exhibit 2 attached to this stipulation.

On October 4, 1948, a negotiable 90 day promissory note for $10,000.00 was given to said bank, signed "Wilburn Boat, Inc." by J. H. Wilburn, being in renewal and extension of the above mentioned note of August 4, 1948. Said note of October 4, 1948, is Exhibit 3 attached to this stipulation.

[fol. 42] On October 21, 1948, the boat was pledged to said bank by chattel mortgage of said date, signed "Wilburn Bros. Boat Company, a Corporation, by L. G. Wilburn, President, J. F. Wilburn, Secretary", such chattel mortgage being Exhibit 4 of this stipulation.

On October 25, 1948, "Wilburn Bros. Boat Company, a Corporation" acting by L. G. Wilburn, President and J. F. Wilburn, Secretary, executed a negotiable one year promissory note in favor of J. F. Wilburn and J. H. Wilburn for $8,000.00, being Exhibit 5 attached to this stipulation.

On the same date "Wilburn Bros. Boat Company, a Corporation", acting as aforesaid, pledged said boat to said J. F. Wilburn and J. H. Wilburn by chattel mortgage of said date, being Exhibit 6 attached to this stipulation.

The indebtedness of $20,000.00 to said bank and of $8,000.00 to J. F. Wilburn and J. H. Wilburn, above mentioned, were unpaid at the time the boat sank as a result of being burned by fire on February 25, 1949, and the chattel mortgages above mentioned had not been released at said time but were in full force and effect.

The indebtednesses and pledges hereinabove mentioned were created and made without the consent of the defendant.

On May 12, 1949, the defendant Firemen's Fund Insurance Company tendered to Glen, Franklin and Henry Wilburn, DBA Wilburn Boat Company, Denison, all premiums paid to the defendant under the policy involved in this case [fol. 43] from the time that the boat Wanderer was purchased by said J. F., J. H., and L. G. Wilburn. This tender was refused on May 19, 1949, without objection to the form or sufficiency of the tender.

It is further stipulated that the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, has never had and

does not now have a permit to do business in the State of Texas.

The Boat Wanderer was purchased by the plaintiffs, J. F. Wilburn, J. H. Wilburn and L. G. Wilburn by bill of sale of June 9, 1948, for a cash consideration of $9,000.00, said bill of sale being Exhibit 7 of this stipulation.

The ownership of said boat remained unchanged until September 24, 1948, at which time it was sold and transferred by the plaintiffs, J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, to the plaintiff Wilburn Boat Company, a Corporation, by bill of sale of said date, reciting a consideration of $9,000.00, such bill of sale being Exhibit 8 to this stipulation.

It is further stipulated that all of the stock of the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, was owned by the plaintiffs J. F. Wilburn, J. H. Wilburn and L. G. Wilburn.

It is further stipulated that all exhibits attached to this stipulation shall be considered as forming a part of the record in this case.

(In accordance with the last paragraph of above stipultion the exhibits introduced and marked and which were to be attached to said stipulation are hereinafter shown on the following pages:

[fol. 44] STIPULATION EXHIBIT 1

Denison, Texas, August 4, 1948.

Ninety . . . days after date, without grace, for value received, I, we, or either of us promise to pay to the order of The Citizens National Bank of Denison, Denison, Texas $10,000.00, Ten Thousand and 00/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of five per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any

of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney for collection, or if it is collected through a Bankrupt Court, a probate Court, or any other Court, then an additional ten per cent on the principal and interest shall be added as attorney's fees for collection.

Address. Wilburn Brothers Boat Company.
By (S.) J. H. Wilburn, (S.) J. F. Wilburn.

Due 10-4-48.
No. A13848.

CM "Wanderer"

Written in ink across note: Renewed.

[fol. 45] STIPULATION EXHIBIT 2

The State of Texas,
County of Grayson.

Know All Men By These Presents:

That I. Wilburn Brothers Boat Company By J. H., J. F. and L. G. Wilburn of Grayson County, Texas, hereinafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by The Citizens National Bank of Denison, Denison, Texas, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bargained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all livestock, give number, kind, age and brand).

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is free of all liens and claims and is located on Lake Texoma.

together with all of the increase of, from and to, the above described property, prior to the full payment of the in-

debtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full, save and except such livestock as may be herein especially reserved.

[fol. 46] To Have And To Hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part hereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by One certain promissory note, as follows: one note dated August 4, 1948 due Ninety days from date for $10,000.00 and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same shall stand secured by and payable under this mortgage with the other indebtedness herein mentioned, provided, however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described prop-
[fol. 47] erty to secure the note, or notes, above named and described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the prop-

erty above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgager the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself, at his own expense, to provide with food, pasturage and attention, and to give the same all of the attention which the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of $— at the execution and delivery hereof.

[fol. 48] It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without the consent of the bank should surrender possession of any of said property or sell any part thereof, or if

the mortgagor should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enfore collection thereof in the same manner as if the full time for the maturity of the same had lapsed. In the event that more than one note is secured by this mort-age, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to [fol. 49] the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisement. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the securing, taking and caring for any property above described or the gathering and marketing of any crops shall be borne by said mortgagor and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be canceled and released at the expense of the mortgagor. The taking of this mortgage shall not waive or impair any other security said bank may have or hereafter acquire for the payment of the above indebtedness nor shall the taking of any such additional security waive or impair this mortgage, but said bank may resort to any security it may have in the order it may see proper.

A bill of sale hereunder from the said bank or any of its agents, officers, attorneys, or assigns, as such, conveying the said property or any part thereof, shall be fully and conclusive evidence and proof that all of the terms, conditions

[fol. 50] and prerequisites required herein have been fully complied with; and said mortgagor hereby ratifies and confirms any and all acts of the said bank, its officers, agents, attorneys and assigns, done under and by virtue hereof.

It is further agreed and stipulated between the parties hereto that in the event the bank should exercise its option to declare all of the indebtedness above referred to, immediately due and payable and proceed at once to enforce collection thereof, in the same manner as if the full time for the maturity of the same had elapsed, by reason of any of the foregoing actions on the part of the mortgagor, that then, and in that event, by the term "indebtedness" is meant the full amount of the principal and interest due by the mortgagor at the time that the bank exercises such option. In no event shall the bank collect or attempt to collect any unearned interest on said indebtedness at the time that the bank so exercises such option to declare said indebtedness due, but all interest included in the face amount of the note applicable to a period after the accelerated maturity shall constitute a credit against the face amount of the note, and all interest paid in advance and applicable to a period after the accelerated maturity shall constitute a credit on the amount of indebtedness, as above defined, then lawfully owing on such note.

Erasures and interlineations made and approved before signing.

[fol. 51] Witness our hands this the 4th day of August, A. D. 1948.

Wilburn Brothers Boat Company, by (S.) J. H. Wilburn, J. F. Wilburn, L. G. Wilburn.

Executed and delivered in the presence of the undersigned:

. . . . . .

. . . . . .

Note: None of reversed side is filled in, therefore omitted by reporter.

* * * * * * *

STIPULATION EXHIBIT C

Denison, Texas, October 4, 1948.

Ninety days after date, without grace, for value received, I, we or either of us promise to pay to the order of The Citizens National Bank of Denison of Denison $10,000.00 Ten Thousand and no/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of 5 per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and [fol. 52] agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney, for collection, or if it is collected through a Bankrupt Court, a Probate Court, or any other Court, then an additional ten per cent of the principal and interest shall be added as attorney's fees for collection.

Address.

(S.) Wilburn Boat Inc., by J. H. Wilburn.

No. A15207.

Written in ink across note: Renewed.

Separate Collateral Agreement

The undersigned, for a valuable consideration, agree with Citizens National Bank of Denison, as follows:

For the purpose of securing said Bank in the payment of all indebtedness now owing to it or which may hereafter become owing to it by the undersigned or by or by any of all of such parties, the undersigned hereby pledge, transfer and deliver to said Bank the following securities, to-wit:

Renewal—note #13848.

Attached to this note.

Collateral unchanged.

[fol. 53] The undersigned further agree with said Bank as follows:

That any and all securities or other property heretofore, now or hereafter pledged or delivered by any of the under-

signed to said Bank to secure any indebtedness to said Bank, shall be held and construed to be pledged hereunder and as if fully described herein, an- may be held by said Bank as security for any and all debts and obligations of any or all of undersigned to said Bank for the payment of money, whether such debts, liabilities and obligations now exist or are hereafter incurred or arise and whether the obligation or liability thereon of the undersigned or any of them be direct, contingent, primary, secondary, joint, several, joint and several, or otherwise, and whether such obligations be of the same character or different.

That this pledge shall be in no wise affected by any indulgence or indulgencies, extension or extensions, change or changes in the form, evidence, maturity, rate of interest or otherwise of any of the debts or obligations secured under, or assigned by, this instrument, nor by want of presentment, notice, protest, suit or indulgence upon any of such obligations secured under, or assigned by this instrument.

That, upon failure of any party to keep and perform any agreement herein contained or otherwise made with said Bank, or in case of the insolvency or failure in business of any party whose obligation to the Bank is secured in whole or in part hereunder, said Bank may, at its option, at once mature all debts and liabilities hereby secured.

[fol. 54] That, if the securities at any time held in pledge hereunder shall decline in value, the undersigned will, on demand, forthwith make payment of the debts and obligations then secured hereby or deposit additional securities under this pledge to the satisfaction of said Bank.

That, upon failure to keep and perform any agreement herein contained, said Bank is authorized and empowered, without either demand, advertisement or notice of any kind, to sell at public or private sale, the whole or any part of the securities then held by it in pledge hereunder, and transfer and deliver same to the purchaser or purchasers thereof, and receive the proceeds of sale. Said Bank to have the same right to purchase at said sale as a stranger. Sale or part of securities held in pledge hereunder shall not exhaust this power of sale, but sales may be made from time to time until all securities are sold, or debts and liabilities hereby secured paid in full. Said Bank shall receive the proceeds

of such sale or sales, which shall be paid and accredited on said debts and liabilities then secured hereby, said Bank to have option of application thereof. Any surplus after payment in full of said debts and liabilities to be paid to undersigned.

This instrument and all rights and powers hereunder, together with the securities then held in pledge hereunder, may be transferred and assigned by said Bank at such time and upon such terms as it may deem advisable; and such assignee shall succeed to all the rights and powers of said Bank hereunder.

(S.) Wilburn Boat Co., by J. H. Wilburn.

[fol. 55] STIPULATION EXHIBIT 4

THE STATE OF TEXAS,
County of Grayson:

Know All Men by these Presents:

That I, Wilburn Brothers Boat Company, a corporation of Grayson County, Texas, hereafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by The Citizens National Bank of Denison, Denison, Texas, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bargained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all livestock, give number, kind, age and brand.)

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is free of all other liens and claims and is located on Lake Texoma.

It is hereby understood and agreed that this mortgage and note described herein are given in renewal and extension of a certain mortgage and note dated August 4, 1948,

in the amount of $10,000.00 payable Ninety days from date, signed by Wilburn Brothers Boat Company with J. H. Wilburn, and J. F. Wilburn together with all of the increase of, [fol. 56] from and to, the above described property, prior to the full payment of the indebtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full, save and except such livestock as may be herein especially reserved.

To have and to hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part thereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by our certain promissory note, as follows: One note date October 21, 1948, due January 4, 1949 for $10,000.00 and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same shall stand secured by and payable under this [fol. 57] mortgage with the other indebtedness herein mentioned, provided, however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described property to secure the note, or notes, above named and

described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the property above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgagor the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same [fol. 58] now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself, at his own expense, to provide with food, pasturage and attention, and to give the same all the attention which the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of $ ..... at the execution and delivery hereof.

It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without

the consent of the bank should surrender possession of any of said property or sell any part thereof, or if the mortgagor should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enforce collection thereof in the same manner as if the full time for the [fol. 59] maturity of the same had lapsed. In the event that more than one note is secured by this mortgage, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisement. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the securing, taking and caring for any property above described or the gathering and marketing of any crops shall be borne by said mortgagor and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be canceled and released at the expense of the mortgagor. The taking of this mortgage shall not waive or impair any other security said bank may [fol. 60] have or hereafter acquire for the payment of the above indebtedness nor shall the taking of any such additional security waive or impair this mortgage, but said bank may resort to any security it may have in the order it may see proper.

A bill of sale hereunder from the said bank or any of its agents, officers, attorneys, or assigns, as such, conveying

the said property or any part thereof, shall be full and conclusive evidence and proof that all of the terms, conditions and prerequisites required herein have been fully complied with; and said mortgagor hereby ratifies and confirms any and all acts of the said bank, its officers, agents, attorneys and assigns, done under and by virtue hereof.

It is further agreed and stipulated between the parties hereto that in the event the bank should exercise its option to declare all of the indebtedness above referred to, immediately due and payable and proceed at once to enforce collection thereof, in the same manner as if the full time for the maturity of the same had elapsed, by reason of any of the foregoing actions on the part of the mortgagor, that then, and in that event, by the term "indebtedness" is meant the full amount of the principal and interest due by the mortgagor at the time that the bank exercises such option. In no event shall the bank collect or attempt to collect any unearned interest on said indebtedness at the time that the bank so exercises such option to declare said indebtedness due, but all interest included in the face amount of the note applicable to a period after the accelerated maturity shall constitute a credit against the face amount of the [fol. 61] note, and all interest paid in advance and applicable to a period after the accelerated maturity shall constitute a credit on the amount of indebtedness, as above defined, then lawfully owing on such note.

Erasures and interlineations made and approved before signing.

Witness my hand this the 21st day of October, A. D. 1948.

Wilburn Brothers Boat Company, a corporation, by
(S.) L. G. Wilburn, Pres., J. F. Wilburn, Sec.

Executed and delivered in the presence of the undersigned:

——— ———, Signature unascertainable.

A. J. Martin.

Note: None of reverse side is filled in, therefore omitted by Reporter.

STIPULATION EXHIBIT 5

Denison, Texas, October 25, 1948.

One Year after date, without grace, for value received I, we, or either of us promise to pay to the order of J. F. Wil- [fol. 62] burn and J. H. Wilburn at The Citizens National Bank of Denison, Denison, Texas, $8,000.00, Eight Thousand and No/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of five per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney for collection, or if it is collected through a Bankrupt Court, a Probate Court, or any other Court, then an additional ten per cent on the principal and interest shall be added as attorney's fees for collection.

Address: Denison, Texas.

Wilburn Brothers Boat Company, a Corporation, by (S.) L. G. Wilburn, Pres., (S.) J. F. Wilburn, Sec.

Due .....
No. .....
CM "Wanderer".

[fol. 63] STIPULATION EXHIBIT 6

THE STATE OF TEXAS,
County of Grayson:

Know All Men by These Presents:

That Wilburn Brothers Boat Company, a corporation, of Grayson County, Texas, hereinafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by J. F. Wilburn and J. H. Wilburn, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bar-

gained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all livestock, give number, kind, age and brand).

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is subject to a first lien to The Citizens National Bank of Denison, Denison, Texas and this mortgage is given as a second lien, together with all of the increase of, from and to, the above described property, prior to the full payment of the indebtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full save and except [fol. 64] such livestock as may be herein especially reserved.

To Have And To Hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part thereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by our certain promissory note, as follows: One note dated October 25, 1948 due One year from date for $8,000.00 One note dated ——— due ——— for $—— and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas, and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same

shall stand secured by and payable under this mortgage with the other indebtedness herein mentioned, provided however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness [fol. 65] by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described property to secure the note, or notes, above named and described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the property above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgagor the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself at his own expense, to provide with food, pasturage and attention, and to give the same all the attention which [fol. 66] the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of $—— at the execution and delivery hereof.

It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without the consent of the bank should surrender possession of any of said property or sell any part thereof, or if the mortgagor, should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enforce collection thereof in the same manner as if the full time for the maturity of the same had lapsed. In the event that more than one note is secured by this mortgage, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

[fol. 67] It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisement. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the

curing, taking and caring for any property above de-
ribed or the gathering and marketing of any crops shall
borne by said mortgagor and secured by this mortgage.
Upon payment in full of the indebtedness secured by this
strument the same shall be canceled and released at the
pense of the mortgagor. The taking of this mortgage
all not waive or impair any other security said bank may
ve or hereafter acquire for the payment of the above
debtedness nor shall the taking of any such additional
curity waive or impair this mortgage, but said bank may
sort to any security it may have in the order it may see
oper.
ol. 68] A bill of sale hereunder from the said bank or any
its agents, officers, attorneys, or assigns, as such, con-
ying the said property or any part thereof, shall be full
d conclusive evidence and proof that all of the terms, con-
tions and prerequisites required herein have been fully
plied with; and said mortgagor hereby ratifies and con-
ms any and all acts of the said bank, its officers, agents,
torneys and assigns, done under and by virtue hereof.
It is further agreed and stipulated between the parties
reto that in the event the bank should exercise its option
declare all of the indebtedness above referred to, im-
diately due and payable and proceed at once to enforce
llection thereof, in the same manner as if the full time for
e maturity of the same had elapsed, by reason of any of
e foregoing actions on the part of the mortgagor, that
en, and in that event, by the term "indebtedness" is meant
e full amount of the principal and interest due by the
ortgagor at the time that the bank exercises such option.
no event shall the bank collect or attempt to collect any
nearned interest on said indebtedness at the time that the
nk so exercises such option to declare said indebtedness
e, but all interest included in the face amount of the note
licable to a period after the accelerated maturity shall
stitute a credit against the face amount of the note, and
l interest paid in advance and applicable to a period after
e accelerated maturity shall constitute a credit on the
ount of indebtedness, as above defined, then lawfully
ing on such note.
ol. 69] Erasures and interlineations made and approved
fore signing.

Witness our hands this the 25th day of October, A. D. 1948.

Wilburn Brothers Boat Company, a Corporation. (S.) by L. G. Wilburn, Pres. (S.) J. F. Wilburn, Sec.

Executed and delivered in the presence of the undersigned:

_____,

(Signature unascertainable).

T. F. Miller.

Note: None of reverse side is filled in, therefore omitted by Reporter.

[fol. 70] STIPULATION EXHIBIT #7

Customs Form 1342.
Treasury Department.
3.32, 3.33, 3.34, C. R. 1943.
June, 1944.

The United States of America
Treasury Department
Bureau of Customs

Bill of Sale of Enrolled Vessel.

To All To Whom These Presents Shall Come, Greeting:

Know Ye, That * We, R. D. Marshall, of Rock Island, Illinois, an owner of an undivided one-half (1/2) interest, and John D. Shuler, of Des Moines, Iowa, an owner of an undivided one-half (1/2) interest of the gas stern-wheel boat or vessel called the Wanderer of the burden of sixty-four (64) tons, or thereabouts, for and in consideration of the sum of Nine thousand ($9,000.00) dollars, lawful money of the United States of America, to us in hand paid, before the sealing and delivery of these presents, by ** J. F. Wilburn,

* Here insert the name and address of each vendor, and the part conveyed by him.

** Here insert the name and address of each vendee, and the part conveyed by him.

J. H. Wilburn and L. G. Wilburn (each of whom thereby acquires an undivided one-third interest in the said Wanderer) the receipt whereof we do hereby acknowledge and are therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said ** J. F. Wilburn, J. H. Wilburn and L. G. [fol. 71] Wilburn, (each of whom thereby acquires an undivided one-third interest in the said Wanderer) their executors, administrators, successors, and assigns, all of the said gas stern wheel boat Wanderer or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture and all other necessaries thereunto appertaining and belonging; the latest Consolidated Certificate of Enrollment and License of which said boat or vessel is as follows viz:

A True Copy of the Latest Consolidated Certificate of Enrollment and License.

The United States of America
Treasury Department
Bureau of Customs

Permanent or temporary—Permanent.
Certificate No. 3.
Measured at Rock Island, Ill. 1931.
Rebuilt at — 19—.
Remeasured at — 19—.
Official No. 231171.
Combined radio call and signal letters.
Service: Misc.
[fol. 72] Number of Crew, excluding Master: 3.
Horsepower: 100 Gas engine.

Consolidated Certificate of Enrollment and License

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, R. D. Marshall of 1337-21st Avenue, Rock Island, Illinois having taken and subscribed the oath required by law, and having sworn that he, owning one-half (1/2) to-

** Here insert the name and address of each vendee, and the part conveyed by him.

gether with John D. Shuler of 28 Foster Drive, Des Moines, Iowa, owning one-half (1/2), are citizen of the United States and the sole owner of the vessel called the Wanderer, of Chicago, Illinois and that the said vessel was built in the year 1931, at Rock Island, Illinois, of wood as appears by P.E. No. 4 issued at this port September 5, 1941, now surrendered by copy, original lost and property changed, and said enrollment having certified that the said vessel is a Gas Stern wheel; that she has one deck, no masts, a plain stem, and a square stern; that her register length is 65.0 10 feet, her register breadth 17.0 10 feet, her register depth 2.65 10 feet, her height — 10 feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	16	26
Capacity between decks above tonnage deck	—	—
Capacity of enclosures on the upper deck, viz: Forecastle —; bridge — ; poop —; break —; Houses-deck 48.68 side —, chart —, radio —, excess hatchways —; light and air —	48.	68
Gross Tonnage	6.4	94

[fol. 73] Deductions under section 4153, Revised Statutes, as amended (section 77, title 46, United States Code):

Crew space, —; Master's cabin —; Steering gear, —; Anchor gear, —; Boatswain's stores, —; Chart house, —; Donkey engine and boiler, —; Radiohouse, —; Storage of sails, —; Propelling power (actual space, —),	0.	00
Total Deductions	—	
Net Tonnage	64.	

The following-described spaces, and no others, have been ommitted, viz: Forepeak —, afterpeak —, other spaces (except double bottoms) for water-ballast —; open forecastle —, open bridge —, open poop —, open shelter deck —, cabins —, companions —, galley —, skylights —, wheelhouse —, water-closets —; anchor gear —; condenser —, donkey engine and boiler —, steering gear —, light and air spaces —, other machinery spaces —, — and the owner — having

agreed to the description and measurement above specified, the said vessel has been duly Enrolled at this Port:

License

And R. D. Marshall, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is here granted for the said vessel to be employed in carrying on the Coasting Trade for one year from the date hereof, and no longer.

[fol. 74] Given under my hand and seal, at the Port of Chicago, Illinois, District of Chicago, this third day of September, in the year one thousand nine hundred and forty-six.

(S.) B. A. Meiners, Assistant Collector of Customs.

To have and to hold the said vessel "Wanderer" and appurtenances thereunto belonging unto them the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns, to the sole and only proper use, benefit, and behoof of the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns forever: And we the said R. D. Marshall and John D. Shuler have promised, covenanted, and agreed, and by these presents do promise, covenant, and agree, for ourselves, our executors, administrators, successors, and assigns, to and with the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns to warrant and defend the said vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In Testimony Whereof, The said R. D. Marshall and John D. Shuler have hereunto set their hand and seal this 7th day of June, in the year of our Lord one thousand nine hundred and forty-eight.

(S.) R. D. Marshall, (Seal). John D. Shuler, (Seal.)

Signed, sealed, and delivered in the presence of: (S.) Ruth Pastel, (S.) Walter L. Hulstedt.

[fol. 75] State of Iowa,[1]
County of Scott. ss.

Be It Known, That on this 7th day of June, 1949, personally appeared before me,[2] R. D. Marshall and John D. Shuler and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 7th day of June, A. D. 1948.

(S.) Erna Hoefer. (Seal.)

[fol. 76] Indorsed on back as follows: Office of Collector of Customs, District of Galveston No. 22, Port of Houston, Texas.

Received for record on the 19th day of November, A. D. 1948 at 2:50 o'clock P.M., and recorded in Book No. B-4 Instrument No. 89.

George L. C. Pratt, Acting Collector, By (S.) — (Name unascertainable), Deputy Collector of Customs.

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[1] This acknowledgment may be made to conform to requirements of State laws.

[2] If the vendor is a corporation, write: — "who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent (the acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal, that fact must be stated in place of the statement respecting the seal,) of the (name of corporation), the corporation which is described in an- executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

STIPULATION EXHIBIT 8

Customs Form 1342.
Treasury Department.
3.32, 3.33, 3.34 C.R. 1943.
Jan. 1947.

The United States of America
Treasury Department
Bureau of Customs

Bill of Sale of Enrolled Vessel.

To All To Whom These Presents Shall Come, Greeting:

Know Ye, that * We, J. H. Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest, J. F. [fol. 77] Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest, and L. G. Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest of the oil stern-wheel boat or vessel called the Wanderer of the burden of sixty-four (64) tons, or thereabouts, for and in consideration of the sum of Nine thousand ($9,000.0) dollars, lawful money of the United States of America, to us in hand paid, before the sealing and delivery of these presents, by** Wilburn Boat Co., a corporation the receipt whereof we do hereby acknowledge and are therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said ** Wilburn Boat Company, a corporation, whose office and principal place of business is Durant, Bryan County, Oklahoma, its successors, and assigns, all of our right, title and interest of the said oil stern wheel boat or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the latest Consolidated Certificate of Enrollment and License of which said boat or vessel is as follows, viz: A True Copy of the Latest Consolidated Certificate of Enrollment and License.

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* Here insert the name and address of each vendor, and the part conveyed by him.

** Here insert the name and address of each vendee, and the part conveyed by him.

The United States of America
Treasury Department
Bureau of Customs

Permanent or temporary—Permanent.
Certificate No. 3.
[fol. 78] Measured at Rock Island Ill., 1931.
Rebuilt at — 19—.
Remeasured at — 19—.
Official No. 231171.
Combined Radio call and signal letters.
Service: Misc.
Number of Crew, Including Master: 3.
Horsepower: 100 Gas engine.

Consolidated Certificate of Enrollment and License

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, R. D. Marshall of 1337 21st Avenue, Rock Island, Illinois having taken and subscribed the oath required by law, and having sworn that he, owning one-half (1/2), together with John D. Shuler of 28 Foster Drive, Des Moines, Iowa, owning one-half (1/2) are citizen of the United States and the sole owner of the vessel called the Wanderer, of Chicago, Ill. and that the said vessel was built in the year 1931, at Rock Island, Illinois, of wood as appears by P.E. No. 4 issued at this port September 5, 1941, now surrendered by copy, original lost and property changed and said enrollment having certified that the said vessel is a gas stern-wheel; that she has one deck, no masts, a plain stem, and a square stern; that her register length is 65.0 10 feet, her [fol. 79] register breadth 17.0 10 feet, her register depth 2.65 10 feet, her height — 10 feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	16	26
Capacity between decks above tonnage deck	—	—
Capacity of enclosures on the upper deck, Viz:		
Forecastle —; bridge —; poop —; break —; houses-deck 48.68, side —, chart —, radio —; excesses hatchways —; light and air —	48	68
Gross Tonnage	64	94

Deduction under section 4153, Revised Statutes, as amended (section 77, title 46, United States Code):

Crew space, —; Master's cabin, —; Steering gear, —; Anchor gear, —; Boatswain's stores, —; Chart House, —; Donkey engine and boiler, —; Radiohouse, —; Storage of Sails, —; Propelling power (actual space, —) —;		
Total Deductions	0	00
Net Tonnage	64	

The following-described spaces, and no others have been omitted, viz: Forepeak —; aftpeak —; other spaces (except double bottoms) for water-ballast —; open forecastle —, open bridge —, open poop —, open shelter deck —, cabins —, companions —, galley —, skylights —, wheelhouse 11.38, water-closets —; anchor gear —; condenser —; donkey engine and boiler, steering gear —, light and air spaces 8.68, other machinery spaces —, — and the owner having agreed to the description and measurement above specified, the [fol. 80] said vessel has been duly Enrolled at this Port:

License

And R. D. Marshall, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is hereby granted for the said vessel to be employed in carrying on the Coasting Trade for One Year from the date hereof, and no longer.

Given under my hand and seal, at the Port of Chicago, Illinois, District of Chicago, this third day of September, in the year one thousand nine hundred and forty-six.

(S.) B. A. Meiners, Assistant Collector of Customs.

To Have And To Hold the said Oil, Stern wheel boat called "The Wanderer" of the burden of 64 tons or thereabouts and appurtenances thereunto belonging unto it the said Wilburn Boat Company, a corporation, its successors, and assigns, to the sole and only proper use, benefit, and

behoof of its successors, and assigns forever; And we the said J. H. Wilburn, J. F. Wilburn and L. G. Wilburn have promised, covenanted, and agreed, and by these presents do promise, covenant, and agree, for their executors, administrators, successors, and assigns, to and with the said Wil- [fol. 81] burn Boat Company, a corporation, its successors, and assigns to warrant and defend the said oil stern wheel boat called "The Wanderer" vessel and all the other beforementioned appurtenances against all and every person and persons whomsoever.

In Testimony Whereof, The said J. H. Wilburn, J. F. Wilburn and L. G. Wilburn ha hereunto set our hand and seal this 24th day of September, in the year of our Lord one thousand nine hundred and forty-eight.

(S.) J. H. Wilburn, (Seal); (S.) J. F. Wilburn, (Seal); (S.) L. S. Wilburn, (Seal).

Signed, sealed, and delivered in the presence of Alexander Gullett, James P. Riley.
State of Texas,[1]

County of Grayson, ss.

Be It Known, That on this 24th day of September, 1948 personally appeared before me,[2] J. H. Wilburn, J. F. Wil-

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[1] This acknowledgement shall be made to conform to requirements of the law of the locality where made.

[2] If the vendor is a corporation, write: . . . . . "who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent (The acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal that fact must be stated in place of the statement respecting the seal) of the (name of corporation), the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

[fol. 82] burn, and L. G. Wilburn and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 24th day of September, A. D. 1948.

(Seal) (S.) Alexander Gullett, Notary Public, Grayson County, Texas.

Indorsed on back: Treasury Department, Bureau of Customs. Bill of Sale of Enrolled Vessel. J. H. Wilburn, et al., to Wilburn Boat Company, A Corporation, Office of Collector of Customs, District of Galveston No. 22, Port of Houston, Texas. Received for record on the 19th day of November, A. D. 1948 at 2:55 o'clock P. M. and recorded in Book No. B-4, Instrument No. 90. George L. C. Pratt, Acting Collector, By (Name unintelligible), Deputy Collector of Customs.

STATEMENT BY MR. KEITH

Mr. Keith:

Your Honor, we have stipulated some facts to the Court reporter. I think it would be proper—

[fol. 83] The Court:

What is the general outline of that stipulation?

Mr. Keith:

Well, one, Your Honor, covers the use of the boat. The general outline of that is that the boat was not used solely for private pleasure purposes, but was purchased to be used for hiring and chartering and was remodeled and redesigned for that purpose. It was in fact used for that purpose to the extent that passengers were available up to the time it sank as a result of being burned by fire on February 25, 1949; that during January of 1949 the boat received some storm damage and as a result of that was placed over at the Lake Texoma Boat and Dock Company for repairs and it remained at the Texoma Boat and Dock Company for repairs until a few days before February 25, 1949, at which time it was returned to its regular mooring place at Burns Run Resort.

Another one, stipulation we have made, concerns the question of mortgages. We have stipulated that, I believe, it was

June, 1948, that the three Wilburn Brothers borrowed $10,000.00 from the Citizens National Bank at Denison; that later on August 4th they borrowed an additional $10,000.00, and pledged this boat by a chattel mortgage of that date to the bank; that on October 4th, a note was signed by Wilburn Boat, Inc., for $10,000.00 to the bank, being in renewal and extension of that note of August 4th; that on October 21st, a chattel mortgage was given by the Wilburn Bros. Boat Company, A Corporation, to the same bank, reciting that it was in renewal and extension of the prior chattel mortgage; that on October 25, 1948, a note was given by this [fol. 84] corporation—I have forgotten exactly how that one was signed. I believe it was also Wilburn Boat Company, a Corporation, to Mr. J. F. Wilburn and Mr. J. H. Wilburn for $8,000.00, and a chattel mortgage. The boat at that time was pledged to them as security for this $8,000.00 mortgage; that those indebtedness of $20,000.00 to the bank and of $8,000.00 to Messrs. J. F. and J. H. Wilburn were unpaid on February 25, 1949; that those chattel mortgages had not been released and were still in full force and effect at that time, and that the making of the notes and the giving of the mortgages was done without the consent of the defendant.

We have stipulated further that on May 12, 1949, the defendant tendered to Messrs. Henry, Franklin and Glenn Wilburn, DBA Wilburn Boat Company, all premiums on the boat Wanderer from the time it was acquired by them in about June—whatever the date was—1948, and that on May 19th, that tender was refused without objection to its form or sufficiency.

We have stipulated that the boat was purchased by bill of sale, I believe the correct date was June 7, 1948, by Messrs. J. H., J. F., and L. G. Wilburn for a cash consideration of $9,000.00 by bill of sale of that date.

That the ownership of the boat remained unchanged from that time until September 24, 1948, at which time it was sold and transferred by them to Wilburn Boat Company, an Oklahoma corporation.

[fol. 85] We have stipulated that the Oklahoma corporation, Wilburn Boat Company, being one of the plaintiffs herein, has never had a permit to do business in the State of

Texas, and does not now have a permit to do business in the State of Texas.

We have stipulated that the three Wilburn Brothers, that I have named, owned all of the stock of the Wilburn Boat Company, the plaintiff, an Oklahoma Corporation.

I believe that covers it, Your Honor. I may have left something out.

The Court:

All right.

J. F. Wilburn, One of Plaintiffs herein, first having been duly sworn, testified as follows:

Direct Examination.

By Mr. Alexandner Gullett:

Q. What is your name?
A. Frank Wilburn.
Q. What are your initials?
A. J. F.

Mr. Keith:

Excuse me. Mr. Hayes would like to make an opening statement if Your Honor will permit it.

The Court:

All right.

[fol. 86] Mr. Hayes:

I will ask Plaintiffs' counsel if he desires to make an opening statement.

Mr. Alexander Gullett:

The pleadings speak for themselves so far as we are concerned.

The Court:

Now, who are you?

Mr. Keith:

Excuse me, Your Honor. He is Mr. Edward B. Hayes of Chicago.

The Court:

All right.

OPENING STATEMENT ON BEHALF OF RESPONDENTS

Mr. Hayes:

This suit is brought, Your Honor, on a policy of marine insurance on a vessel used on navigable waters of the United States. Namely, the Mississippi, the Red River and Lake Texoma. It is a maritime contract governed by the Admiralty or Maritime law, governed by laws of the Federal Sovereignty, and not affected by the law of the state. The Plaintiffs in the suit are three individuals, partners, doing business as Wilburn Boat Company, to whom the insurance policy issued to the former owner was transferred by the agent when they bought the vessel from the former owner in June of 1948. And also Plaintiff here is an Oklahoma corporation, to whom they transferred and sold the boat in the fall of 1948, which is the legal and equitable owner of the vessel. Plaintiffs plead for performance of all conditions of the policy. We deny that. The policy of insurance ex- [fol. 87] pressly provides that it is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the insurers, and that, we think, constitutes an absolute bar to this suit. In addition the plaintiff—the vessel was pledged, first by the partnership, then by this Oklahoma Corporation to a bank in Denison for an indebtedness that was originally Ten Thousand Dollars, later increased to Twenty Thousand Dollars. Then pledged again by the corporation to two of the individual stockholders, Frank and Henry Wilburn. Under the provisions I read and under the laws administered by the Federal Court, of the Federal Courts in admiralty or maritime law we think that absolutely bars recovery. Of

course, under familiar decisions of the Supreme Court and other Federal Courts they know as a matter of judicial knowledge what constitutes navigable waters of the United States. And of course, we ask this Federal Court to take judicial notice that the waters herein involved are such waters. We rely especially on the defenses I have stated.

The Court:

Well, that is straining a good deal for me to take judicial notice that the waters of Lake Texoma are navigable within the meaning of the Admiralty Laws, isn't it?

Mr. Hayes:

I believe the definition of navigable waters of the United States under the decision by the Supreme Court in the Daniel Ball case—

[fol. 88] The Court:

They have expressly decided that the waters of Red River are not navigable.

Mr. Hayes:

The waters of Red River at the present time since the construction of the dam—

The Court:

I mean in that vicinity, of course.

Mr. Hayes:

I understand, Your Honor.—are navigable waters of the United States, and the Supreme Court holding that an artificial, purely artificial water where they just dug some dry land and then becomes navigable by which communication may be had between the States is navigable water of the United States subject to the jurisdiction of the United States.

The Court:

I want to see some authorities, because I know the Supreme Court of the United States has held that the waters of Red River at that point are not navigable in fact. I think that was held in the Texas and Oklahoma boundary dispute.

But I want your authorities upon the proposition that the waters of Lake Texoma are navigable within the meaning of the Federal law.

Mr. Hayes:

Certainly, sir. The United States Coast Guard is out there in charge, under that provision of the Constitution on the grounds that they are navigable. The vessel is an enrolled vessel.

[fol. 89] The Court:

I understand all those vessels are subject to registration, that they are all registered. But I want your authorities upon that proposition that those are navigable waters within the meaning of that clause. But go ahead from there.

Mr. Hayes:

Thank you, sir. In addition to what I have stated the vessel was built as a pleasure yacht, and her former owners used her as such. The Wilburns and the Oklahoma Corporation to which they transferred it chartered her, however, and used her for commercial purposes. They meant to do so from the beginning, but when the insurance was transferred to them that was not disclosed, nor when the policy was delivered to them, nor when any of the indorsements became effective. No disclosure was made of the intended or actual commercial use. That would, under the Admiralty law governing marine policies, alone, void the policy for failure to disclose material facts. The policy also expressly provides, "It is warranted by the insured that the within named vessel shall be used solely for a private pleasure vessel during the period of this policy and shall not be hired or chartered until permission is granted hereon."

The policy also expressly provides that it shall be void for any fraudulent or false swearing before or after the loss. J. H. Wilburn, examined on deposition after the suit was filed, said he was the pilot of the boat, but that he didn't find any letters about chartering the vessel, although there were some; didn't know whether there was more than

whether there was more than three or four, five, ten
90] or one hundred.

Court:

'dn't get your number. What was the last part of that said?

Hayes:

iat the policy itself renders the coverage void for any d or false swearing, either before or after——

Court:

hat did you say your claim was about this false swear- I didn't get your statement.

Hayes:

ie statement that he didn't know whether there was —referring to letters about chartering the vessel—less three of those letters. I beg your pardon. Didn't whether there were more than three. He didn't know her there were less than six, less than ten, fifteen, one lred, one thousand, two thousand, five thousand, one lred thousand. Similar testimony was given by him spect to other letters. Similar testimony was given by in respect to the number of times passengers were on the boat, and the number of passengers on the at various times; that he didn't know if it was less two hundred. He didn't know if a letter showed to him eshed his recollection; he didn't know when the first was he remembered talking to his brother about ren- ng the boat commercial. That is, he didn't remember the time. And he didn't know whether the signatures .91] appearing alongside of his on some documents essed by the National Park Service were signatures of brother, and so on throughout that deposition, which is long to read. We think those were not disclosures, icularly the statements made under oath were not . We think that the failure to disclose was for the pur- of preventing a full discovery of the facts by the rer, and they fall under the provisions of the policy. at we have in short is a policy issued to individual- er suit by an Oklahoma corporation, and an averment to

the conditions of the policy which is denied. The burden is upon the plaintiffs to prove that there was a compliance which he has alleged with the terms of the policy.

The Court:

Proceed, Mr. Gullett.

Q. What is you name?

A. J. F. Wilburn.

Q. You are Frank Wilburn; is that correct?

A. Yes, sir.

Q. Is Glen Wilburn your brother?

A. Yes, sir.

Q. J. H. Wilburn is your brother Henry; is that correct?

A. Yes, sir.

Q. Mr. Wilburn, I will ask you whether or not in the early part of 1948, you and your brothers began negotiating for a boat? Is that correct?

A. Yes.

Q. Was that boat known as the Wanderer?

A. Yes, sir.

[fol. 92] Mr. Keith:

Excuse me. We can't hear you over here.

Q. Where was the boat purchased?

A. Greenville, Mississippi.

Q. State whether or not it was later transferred to Lake Texoma?

A. Yes. We purchased the boat on or about, I believe it was June 4th; somewhere around there; and brought it up Red River to Lake Texoma.

The Court:

When was that, in '48?

A. That was in '48, yes sir.

Q. Do you recall the month you got it over into Lake Texoma, Mr. Wilburn?

A. I believe it was in August.

Q. 1948?

The Court:

Where was that boat in Mississippi at the time? Was it on the Mississippi River?

A. It was in a lake off the Mississippi River, that adjoined the town of Greenville, Mississippi.

The Court:

All right.

Q. Was the boat placed in Lake Texoma?

A. Yes sir.

Q. Were certain repairs made on the boat after it was placed in Lake Texoma?

A. Yes sir.

Q. Were you issued a policy by the Firemen's Fund Insurance Company, Mr. Wilburn?

[fol. 93] A. Yes sir.

Q. Is that the policy?

A. Yes sir.

Q. We introduce the policy in evidence as Plaintiffs' Exhibit No. 1.

(Policy so marked, and is shown hereinafter. See Index for page reference.)

The Court:

What is the date of that policy?

Mr. Gullett:

May 22, 1948, is the original expiration date, and it was extended for another year after that, Judge Bryant.

Mr. Keith:

May I see it? (Mr. Keith examines policy.)

Q. After you got the boat on the Lake, what—just give Judge Bryant in your own words the nature of the repairs you did to the boat.

A. Well, after we taken the boat out of the river, we moved it overland to the edge of the lake, and we worked the hull over on the boat, and part of the interior we tore out at that time before we actually placed it on the lake, and after we did that we put it on skids and slid it into the

water of Lake Texoma, and taken it to Texoma Boat and Dock Company, and over there we scraped the boat completely off all over, the old paint; repainted it, put new rails up all around the bottom and top deck. We installed a Diesel engine; taken out the old engine that we had in there. We installed all new light plant equipment which [fol. 94] was a Diesel also. We installed all marine wiring, switch boxes, connections, and everything in connection with marine installation. We installed all new Hot Point marine galley. We removed all of the state rooms and replaced and redone the boat on the inside completely all over; put in a hardwood floor, painted the interior of the boat. We built little tables on the inside of the boat.

Q. Mr. Wilburn, when were those repairs completed?

A. I believe it was in September, late September.

Q. Now,—

A. —of '48.

Q. Now, Mr. Wilburn, this policy that has been introduced as Plaintiff's Exhibit 1,—where was that policy delivered to you and by whom?

A. It was delivered to me at our business at 120 North Austin Avenue, Denison, Texas, by Mr. R. L. McKinney.

Q. Mr. Wilburn, I believe the original amount of this policy was $10,000.00, was it not?

A. Yes sir.

Q. Was this amount later increased?

A. Yes sir.

Q. Your Honor, I invite your attention to the indorsement dated December 20, 1948, which reads as follows:

"In consideration of an additional premium of $234.01 it is understood and agreed that the amount of insurance hereunder is increased to $40,000.00. It is further understood and agreed that the said vessel, for so much as concerns the Assured by agreement between the assured and Assurer in this policy is, and shall be valued at $40,000.00."

[fol. 95] Mr. Hays:

Will you read the whole of it, Mr. Gullett?.

Mr. Gullett:

Sir?

Mr. Hayes:

Will you read the whole if it?

Mr. Gullett:

I have no objection to reading all of it. "It is further understood and agreed that the lay-up and cancellation clauses are amended as follows: To return $.25% per cent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters. Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return $7.52% per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return nil per cent. net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival. H. H. Cleaveland Agency, by E. M. Joens. Otherwise, the policy remains unchanged."
changed."

Q. Now then, after the boat was complete, for what purpose was the boat used?

A. Carrying passengers for hire, commercial use.

Q. Do you knew about how many trips that you made, Mr. Wilburn?

A. Approximately around three or four.

Q. Mr. Wilburn, did anything happen to the boat in January of 1949?

A. Yes sir.

[fol. 96] Mr. Keith:

If Your Honor please, we raise the objection all this is covered by stipulation.

Q. I was just leading up to something. I may be killing a little time, Your Honor, but I think I can connect it up.

The Court:

All right. Was that when the fire occurred?

Q. The fire occurred February 25, 1949. That is undisputed, Judge Bryant.

The Court:

All right. You were asking about January of '49.

Q. The vessel was not used for commercial purposes, was it, from January up until the time it burned? Is that correct?

A. Yes sir.

Mr. Hayes:

We object to that as leading and suggestive.

The Court:

It is a little bit leading, but in this Court if we can lead enough to get along——

Mr. Hayes:

Further objection that it calls for the witness' conclusion and opinion.

[97] The Court:

I will overrule that and allow you an exception. Was the boat in use from January to February of 1949?

A. No sir.

The Court:

Go ahead with your examination.

Q. Where was the boat at the time it burned, Mr. Wilburn?

A. It was off the beach of Burns Run, Oklahoma, tied to a buoy.

Q. About what time of day or night did the fire occur?

A. Around one o'clock.

Q. In the morning or afternoon?

A. It was in the morning.

Q. Was any of the boat saved after the fire?

A. No sir.

Q. Just describe what happened to the boat?

A. Well, the boat—when I got out there the boat was on fire and it burnt up and sank and there wasn't any contents of the boat left whatsoever.

Q. Mr. Wilburn, did you make a claim to the Firemen's Fund Insurance Company for payment under this policy?

A. Yes sir.

Q. I hand you herewith a letter, and ask you if you received that letter?

A. Yes sir.

Q. That letter is signed Firemen's Fund Insurance Company by a man whose name I can't make out. Did you receive it in the United States Mail?

A. Yes sir.

[fol. 98] (Mr. Keith examines letter.)

Q. I introduce this as plaintiff's Exhibit 2.

(See Index for page reference where said exhibit is shown herein.)

Q. Your Honor, I will just state the substance of the contents.

The Court:

Just very briefly the substance.

Q. The substance of it is denial of liability under the policy.

The Court:

All right.

Q. Prior to the time the boat burned, had or had not a survey been made of that boat?

A. Yes sir.

Q. Who made that?

A. Mr. R. L. McKinney.

Mr. Keith:

Who did he say?

The Court:

R. L. McKinney.

Q. R. L. McKinney. Now, after the boat burned and you received this letter, has any—has the Firemen's Fund Insurance Company paid you anything on that policy?

[fol. 99] A. No sir.

Q. Mr. Wilburn, did you sign that survey that was made of that boat?

A. Yes sir.
Q. Is that your signature here?
A. Yes sir.

The Court:

What is the date of that?

Q. The date of this is May 30th—No, December 20, 1948, Your Honor. You recall that instrument being prepared, Mr. Wilburn?
A. Yes sir.
Q. And you signed it?
A. Yes sir.
Q. Was that in turn delivered by you to Mr. McKinney?
A. I believe that is right, yes sir.

Mr. Gullett:

I introduce in evidence the Exhibit.

The Court:

Now, was that made in connection with the taking out of additional insurance?

A. (The witness) Yes sir.

The Court:

All right, and prior to the time the insurance was increased; is that correct?

A. (The witness) Yes sir.

Mr. Hayes:

But it wasn't, Your Honor.

[fol. 100] Mr. Gullett:

It was subsequent to the time the insurance was increased, Your Honor.

The Court:

All right. Well, but it was in connection with the additional insurance?

Mr. Gullett:

That is true.

The Court:

All right.

Mr. Keith:

We object to it, Your Honor, it is immaterial to any issue in this case and on the further ground that it is self serving, and—

The Court:

Let me see that.

Mr. Gullett:

The instrument tendered, Judge Bryant is an exhibit identified and attached to the deposition of Mr. Rossow of the H. H. Cleaveland Agency, and the letters in connection with it disclose that a copy of that was forwarded to the Firemen's Fund Insurance Company, which will be introduced in due course.

Mr. Hayes:

That statement, Your Honor—Pardon me, counsel, if Your Honor please, that statement is not quite correct.

[fol. 101] Mr. Gullett:

I refer to the—

Mr. Hayes:

The instrument as offered there is a photostat of a document. That is Point No. 1. The point with respect to the materiality of the document that we are raising now to its relevancy is that it is neither relevant nor material to any of the issues which are made in this case. We have an averment of performance and a denial of it. Those are the issues made by the pleadings and that document is not within the scope of the pleadings or the issues as they have been made.

Mr. Gullett:

Your Honor, a check of that deposition will disclose that we called on these gentlemen, taken at the defendant's request, for the original and instead of sending down the original they sent down a photostat.

Mr. Hayes:

That statement is not correct either, Your Honor. We have not been called on to produce an original. I presume what counsel refers to is cross examination of the witness Rossow. The witness Rossow did not have the original. He produced what was in his file. As far as the original is concerned, the original of the document Your Honor has in his hands is in Court. Accordingly the objection which we are making is to its materiality and relevancy, and I think that perhaps I should add the objection that the original should be offered rather than any copy, and I do that.

[fol. 102] The Court:

Well, have you examined this copy?

Mr. Hayes:

I have, yes.

The Court:

Is there any difference between it and the original?

Mr. Hayes:

No.

The Court:

I will overrule your objection and allow you an exception to that ruling. All right, go ahead.

(Survey marked Plaintiff's Exhibit 3. See Index for page reference.)

Mr. Gullett:

Q. Who wrote this up, who did the typing in here, Mr. Wilburn?

Mr. Hayes:

Your Honor, to save time may we have a running objection to all this line of testimony?

A. I believe Mr. McKinney did that.

The Court:

You make any objection you are advised to when the evidence is offered.

[103] Mr. Hayes:

My objection is to the materiality of the line of questioning which counsel is pursuing with reference to Plaintiff's Exhibit No. 2 (3?) and to all questions he may ask with reference to it, being immaterial and outside the scope of the pleadings.

The Court:

That is overruled and he is allowed an exception to that ruling. Now, go ahead, Mr. Gullett. Have you all made any stipulation about whether or not Mr. McKinney was the agent of this company?

Mr. Gullett:

No sir, we have not, Your Honor.

The Court:

Go ahead.

Mr. Gullett:

I invite your attention to this exhibit which will be No. 3. I invite your attention to this part.

"What waters are to be navigated: Lake Texoma, North of Denison, Texas.

"For what purpose is vessel to be used: Commercial.

"Is boat ever let, chartered, or used for carrying passengers for hire?"—It says the word "chartered", is that correct, Mr. Wilburn?

A. Yes sir.

Q. And that was made out and sent in before the fire occured on the 25th of February, 1949; isn't that correct?

A Yes sir.

[fol. 104] Mr. Keith:

If Your Honor please, we object to the question as being leading and suggestive and a leading and suggestive character of examination.

The Court:

Well, he says that was made in December, '48, so it was obvious that it was before the fire. Anything further?

Mr. Hayes:

We respectfully object, with your permission, Your Honor, if I may state, there is nothing except in the statement that the letter was sent in. That statement I submit would not be material.

Mr. Gullett:

I will connect it up, Judge, in just a minute.

The Court:

Well, of course, if it is not shown that that ever reached your company, why, that would be a different thing, but he says he will connect it up with later testimony, and subject to that statement I will overrule your objection, but if it is not connected up, I will probably sustain your objection.

Mr. Price:

Your Honor, we have it here in this deposition of their witness in Chicago. It comes out of their file. That is how it got in the Court room. We will offer that later.

The Court:

Just leave off the argument. Go ahead with the development of the testimony. Anything further?

[fol. 105] Mr. Gullett:

That is all, Your Honor.

The Court:

Any cross examination?

Mr. Keith:

Yes, Your Honor.

The Court:

Go ahead.

Cross-examination.

By Mr. Keith:

Q. Mr. Wilburn, when you started to purchase this boat over in Greenville you talked with Mr. R. L. McKinney in Denison about getting insurance on it, did you not?

A. I believe that it was just a little after I purchased the boat, and I had maybe talked to him before I purchased it actually, but I talked to him also after we had purchased it, and—

Q. And you had Mr. McKinney take over the job for you and your brothers as being in charge of obtaining your insurance, did you not?

A. Yes sir.

Q. And Mr. McKinney was, as a matter of fact, the agent of you and your brothers for the purpose of obtaining the insurance?

Mr. Price:

We object to any such questions being asked, calling for a conclusion. It is a matter of law for the Court to decide from the facts, what was done.

[fol. 106] The Court:

Well, I think that question is permissible. I will overrule your objection and allow you an exception. Did you ask him to get the insurance for you?

A. Yes sir.

The Court:

All right, go ahead.

Q. Now, when this boat was damaged in January of this year, it was taken over to Lake Texoma Boat and Dock Company; that is correct, is it not?

A. Yes sir.

Q. And remained there undergoing repairs until the latter part of February of 1948. I beg your pardon, January of 1949. Remained there until the latter part of February 1949, before it was brought back over to its regular home mooring place at Burns Run Resort.

A. I believe that is correct.

Q. Burns Run Resort is on the Oklahoma side, is it not?

A. Yes sir.

Q. Now, you spoke of the various work that you did in connection with this boat, Mr. Wilburn. In arriving at what you considered to be the valuation of that boat it is true, is it not, that you included in that amount a total of $25,140.00 as being the amount which you claim is due by the—

Mr. Price:

Just a minute here.

Mr. Keith:

May I finish my question?

[fol. 107] The Court:

Let him finish his question.

Q. Which you claim is due from Wilburn Boat Company to the officers of the corporation?

Mr. Price:

We object to going into the details of the expenses on the boat, because the parties entered into a written agreement and fixed the value of this boat for the purpose of this insurance policy as $40,000.00.

Mr. Hayes:

Your Honor, in response to that, there was a representation for $40,000.00. Representation I should say in connection with request for insurance that $40,000.00 was invested in it.

The Court:

Well, regardless of what the amount of the contract called for, if they can't show that amount of loss they are not entitled to it. I will overrule your objection and allow him to question him about that, Mr. Price, upon the question of value. Go ahead.

Mr. Keith.

Q. Will you answer the question, please, Mr. Wilburn, if you remember it?

A. Yes sir.

Q. That is true, that question I asked you?

A. Yes sir.

Q. Now, included in that you have an item of $2100.00, do you not, Mr. Wilburn, covering the period from March 16, 1948 to May 30, 1948, labor of one man for 75 days at 14 [fol. 108] hours per day at $2.00 per hour; is that correct?

A. Yes sir.

Q. Who was that man?

A. You mind if I see that?

Q. Not at all, sir.

A. I don't recall the exact man that I had this labor bill made out to.

Q. Maybe we can get along a little faster. That was either you or one of your two brothers that you were talking about there.

A. Yes sir, that is right.

Q. During the period from June 1, 1948, to July 19, 1948, you have an item here of $8,280.00 for labor of three men at 60 hours per day, 2,640 hours at $3.00 per hour.

A. Yes sir.

Q. With notation, "This labor being time consumed in moving boat from Mississippi to Lake Texoma." Is that correct, sir?

A. Yes sir.

Q. Now, July 19, 1948, is about the time you got the boat up here to Lake Texoma from its original mooring place in Greenville, Mississippi; is that right?

A. I don't believe we got it up here that quick. No sir, it was a later day.

Q. Later than that?

A. Yes sir.

Q. Now, the next item you have charged up here is an item of $12,960.00 for the period from July 19, 1948, to November 19, 1948, labor of three men, 12 hours per day at $3.00 per hour, 120 days, at 36 hours per day, 4,320 hours at $3.00 an hour. This time being consumed in the repairs and remodeling boat.

[fol. 109] A. Yes.

Q. Now, in both of those last two items, the three men to whom you refer are you and your two brothers, Henry and Glen.

A. Yes.

Q. Then you have charged on here an item of $1,000.00, estimated automobile mileage at 5 cents per mile 20,000 miles.

A. Yes sir.

Q. And the further item of $800.00, estimated cost of air plane expense.

A. Yes sir.

Q. Making a total of $25,140.00.

A. Yes sir.

Q. Now, neither you nor your brothers Henry or Glen had had any particular training or experience in the building or remodeling of boats, had you, Mr. Wilburn?

A. Well, no, not in particular.

Q. You had employed out there on that job people who were carpenters and who had training as carpenters and things of that sort, did you not?

A. Yes sir.

Q. There was a man named Blackshear you had employed out there throughout the entire time, was there not?

A. I believe that is right, yes sir.

Q. And he worked on the boat steadily and regularly every week.

A. Yes sir, I think that is right.

Q. And the compensation you paid Mr. Blackshear was $45.00 a week, or thereabouts, was it not?

A. Yes sir.

Q. You had your younger brother, Alton Wilburn, working out there on the boat with you at the same time, did you not?

[fol. 110] A. Yes sir.

Q. And Alton worked steadily and regularly on the remodeling of the boat, did he not?

A. Yes sir, pretty regularly.

Q. And you paid Alton as well as I recall—I may be mistaken about this—but as well as I recall you paid Alton about $20.00 a week for his services out there; is that correct?

A. Yes sir.

Q. During the time that this boat was being remodeled you and your brother Henry were still engaged in the operation of your grocery store over in Denison, were you not?

A. Yes sir.

Q. The grocery store continued to be operated by you during the entire time that this boat was being remodeled; is that correct, sir?

A. Not exactly by us, no sir. We had managers in charge of it while we were away.

Q. During the entire time the boat was being remodeled you did not employ any additional help of any sort in your grocery store, did you?

A. Not that I recall.

Q. And you and Henry, as you could, would devote your time to the operation of the grocery store, of course, wouldn't you?

A. Well, what little time that we did, yes sir. We did put in a little time on the grocery store, but not a great deal.

Q. The grocery store was at that time and continued to be until recently your means of a livelihood, did it not?

A. Yes sir.

Q. You have had prepared, have you not, Mr. Wilburn, a recapitulation of all checks drawn by Wilburn Boat Company on its account, have you not?

[fol. 111] A. Yes sir.

Q. Making a total of $19,042.27; is that correct?

A. Yes, that is right.

Q. On this statement you have included in here all checks of Wilburn Boat Company, which were drawn on its account, being all payments made by Wilburn Boat Company, whether they were for labor or whether they were for ordinary repairs and maintenance or running repairs or whether they were for what we call capital improvement, have you not, sir?

A. I believe that is right.

Q. In other words, you have made no effort in here on this first column to separate the thing out. Now, you show on here in your second column, do you not, that out of this $19,000.00 that $5266.15 was paid out by you for labor to contractors and so forth.

A. Yes sir.

Q. And that a total of $8,693.20 was paid out for equipment.

A. Yes sir.

Q. And that $554.00 was paid out for plans?

A. Yes sir.

Q. And that supplies, you have $283.68 worth of those; is that right?

A. Yes sir.

Q. And dock equipment, you have $479.38 of that?

A. Yes sir.

Q. That was a dock you had built over at Burns Run Resort for this boat?

A. Yes sir.

Q. Then you have an item here of what you call Sundry of $3,765.86.

A. Yes sir.

Q. Consisting largely of telephone calls and gasoline and oil and advertising and organizational expense and matters of that sort; is that correct, sir?

[fol. 112] A. Yes sir.

Q. Now, excuse me, just a moment, Your Honor. One of these is a partial duplication of the other and I have forgotten which one it is. Now, in addition to that, beginning back in June of 1948, various amounts were paid out, were they not, sir, by your Wilburn Bros. Grocery Company?

A. Yes sir.

Q. A partnership.

A. Yes sir.

Q. And you have compiled a list of those, totaling $2,453.45.

A. Yes sir.

Q. And about what time do you estimate that the boat got up here from Greenville up to the Lake Texoma Dam?

A. Well, we figured 42 days form June 5th would put it to—put it——

The Court:

You got here about July 24th; is that right?

A. Yes sir. Probably around that time.

Q. I understood you to testify a few minutes ago that on the date of July 19th that I mentioned to you that you thought it was after that that the boat got here. That is the reason I was going in to that.

A. Well, I am not for sure. I don't recall the exact dates on that.

Q. Sometime in the latter part of July, 1948; is that correct?

A. I believe that that would be about correct, yes sir.

Q. And up until that date, which I had understood was July 19th, up until that date that you got the boat up here, all the amounts of money that have been expended by Wil- [fol. 113] burn Bros. Boat—by Wilburn Bros. Grocery were for the purposes of getting the boat from Greenville up here, were they not?

A. Yes sir.

Q. And then you had a rather considerable expense, did you not, sir, of building a skid and taking the boat out of the waters of the Red River and putting it over into the waters of Lake Texoma, didn't you?

A. Yes sir.

Q. And all of those amounts are included in here, are they not, sir, on this statement of expenses paid by Wilburn Bros. checks?

A. Yes sir.

Q. After the corporation was formed, did the grocery company continue, from time to time, to pay some of these expenses, loan the corporation money? You kept account of the money you loaned from the grocery company to the boat company?

A. Yes sir.

Q. And the total of those amounts was some $5,204.52, was it not?

A. Yes sir.

The Court:

What is that item there?

Q. $5,204.52. All of these amounts that I have just named, Mr. Wilburn, this 5,204.52, that was repaid by the corporation to the grocery, was it not, in two separate payments?

A. I believe that is right.

Q. And to that extent, that is included in the amounts of disbursements made by the corporation.

A. I think that is right.

[fol. 114] Q. This corporation that was formed by you and your brothers was the Wilburn Boat Company, was it not?

A. Yes sir.

Q. And you had that corporation incorporated in the State of Oklahoma.

A. Yes sir.

Q. For a capital, with a capital stock of $40,000.00; is that right?

A. Yes sir.

Q. Mr. Wilburn, on these statements which were prepared by you and about which we were having some discussion this morning, there are one or two things I haven't made entirely clear. You have this one statement here that we have gone over of Wilburn Boat Company, recapitulation of checks drawn. That was $19,042.27. I want to introduce this at this time as being a statement by them as to their expenses, without taking the time to detail each item in there.

(Said recapitulation or statement marked Defendant's Exhibit 1; see Index for page reference herein.)

Q. I was interrogating you this morning, Mr. Wilburn, with reference to this statement here, and I brought out that this total of $5,204.52 at the end had been repaid.

The Court:

Yes, you have covered that.

Q. Yes sir.

The Court:

There is no use going over that again.

[fol. 115] Q. There is one other point I hadn't brought out, that the other total up above of $2,453.45, that was also repaid by the corporation to the grocery store, was it not?

A. Yes sir.

Q. So all of that is included in the exhibit that we have introduced.

A. I believe that is right.

Q. My confusion was with reference to this statement, this further statement of Wilburn Boat Company, unpaid expenses totaling $3,287.71. That is not included in the exhibit that I have introduced, is it?

A. No sir.

Q. So the amount of 19,000 plus there, plus this amount of 3,287.72 represents the expenditures of the partnership and of the corporation on this boat, does it not?

A. Yes sir.

Q. We introduce this as being a further statement of expenditures.

(Said statement marked Defendant's Exhibit 2. See Index for page reference herein.)

Q. Now, when you filed your income tax return, Mr. Wilburn, for the Wilburn Boat Company, Inc., you filed that for the period beginning July 12, 1948, and ending June 30, 1949, did you not?

A. Yes sir.

Q. And you filed it on an accrual basis, did you not, sir?

A. Yes sir.

Q. And in making your income tax return you did not capitalize on this return the expenditures for labor or material that we have been testifying about here at all, did you?

[fol. 116] A. I don't think so, no sir.

Q. This corporation was created about July 10, 1948, was it not, sir?

A. Yes sir.

Q. You had it capitalized for $40,000.00.

A. Yes sir.

Q. And the instrument I hand you, Mr. Wilburn, is a signed duplicate original of affidavit of payment of the amount of capital stock, which was signed by you and your brothers, was it not?

A. Yes sir.

Q. We offer this in evidence.

(Duplicate original of affidavit of payment of amount of capital stock marked Defendant's Exhibit 3. See Index for page reference herein.)

Q. Now, the only capital stock, the only asset of the Wilburn Boat Company was this boat; is that correct?

A. Yes sir.

Q. On July 10, 1948, at the time that affidavit was made the boat was on the River on its way up.

The Court:

Yes.

Q. —to the dam.

The Court:

Yes, that is true.

A. Yes sir.

[fol. 117] The Court:

That follows automatically. That was an Oklahoma corporation, was it not?

Q. Yes sir. That was an Oklahoma corporation.

A. Yes sir.

Q. The premiums that you paid in connection with this policy, Mr. Wilburn, you paid those to the H. H. Cleaveland Agency and not to Mr. McKinney, did you not, sir?

A. Yes sir.

Q. And those were payments on August 5, 1948, of $419.56, and on February 8, 1949, of $234.81.

A. Yes sir.

Q. Represented by these two checks I hand you here.

A. Yes sir.

Q. Defendant's Exhibits 4 and 5.

The Court:

Who is the Cleaveland Agency?

Q. I wanted to bring that out right now.

(Check for $234.01, payable to H. H. Cleaveland Agency, dated 2/8/1949, marked Defendant's Exhibit 4. Check for $419.56 payable to H. H. Cleaveland Agency, dated

8/5/1948, marked Defendant's Exhibit 4. See Index for page reference.)

Q. Do you know who the Cleaveland Agency is?

A. They are the company that we had the insurance with.

Q. The Cleaveland Agency is an agency in Rock Isla t, Illinois, which had the insurance on this boat for the former owners, Marshall and Shuler.

[fol. 118] A. I believe that is right.

Q. And which continued to keep the insurance after your acquisition of the boat.

A. Yes sir.

Q. Now, when you testified by deposition in this case previously you testified, did you not, Mr. Wilburn, speaking of Mr. McKinney, that you sort of elected him to be your insurance representative and to do whatever he wanted to do about getting insurance on it, and you answered, "That is right", didn't you?

A. That is right.

Q. And that is what the status of Mr. McKinney is in this matter.

A. Yes.

The Court:

He testified to that in answer to my question this morning. Go ahead. Now, don't repeat.

Q. You testified on direct examinaiton this morning, Mr. Wilburn, if I remember your testimony correctly, that the repairs to this boat were completed in September; is that right?

A. I said on or about sometime in September. I don't recollect the exact date.

Q. Then how do you reconcile that, Mr. Wilburn, with this statement "Amount due Officers of the Corporation," that you prepared showing the expenditure of labor all the way down to November 19, 1948?

A. Well, there was the main contractors that had a bi/ lot of the work, probably got through with their work along about the time you spoke of there, and——

Q. Which time that I spoke of?

[fol. 119] A. I believe that was in November and our work continued on, on little odd jobs and things that had to be done that we didn't have the contractors working on.

Q. You had contractors, had Head and Head as contractors, didn't you?

A. Yes sir.

Q. To do most of the work?

A. Not most of it.

Q. The greater part.

A. They did a part of it, but they didn't finish their work and we settled off with them for a set fee and we did a little of the work ourselves and hired the rest of their work done.

Q. What other contractors did you have?

A. We had Koeppen and Baldwin, and we had Weersing I believe working some on the boat. That is Texoma Boat and Dock. And I don't know who else, but I think that would be—

Q. You had various contractors out there who were doing work on the boat, did you?

A. Yes sir.

Q. And the amounts you paid to them are shown in these exhibits that have been introduced here of your expenditures; is that correct, sir?

A. Yes sir.

Q. Now, at the time the boat sank was it moored to its dock, or was it moored a short distance off of the shore?

A. It was moored to the buoy that we used to tie it up to a ways off the shore.

Q. And that was what, about 300 feet off the shore?

A. Approximately 300 feet.

Q. Now, the place where you had the boat moored, that was in Oklahoma, wasn't it?

[fol. 120] A. Yes sir.

Q. The boundary line between Texas and Oklahoma was a considerable distance south of where the boat was moored at the time of the fire?

A. I think that is right, yes sir.

Q. And the regular dock of the boat was about 300 feet north of the place where the boat was moored at the time of the fire.

A. Yes sir.

Q. And all of that was over in Oklahoma?

A. Yes sir.

Q. During the operations of that boat you would carry passengers, would you not, back and forth from Oklahoma over to Texas and back, to the Texas side and back?

A. Well, we never docked on the Texas side to speak of.

Q. I know you didn't dock on the Texas side, but you would actually come over to the Texas side of the water?

A. Yes sir.

Q. Lake Texoma is such a lake that you can carry both goods and passengers from Oklahoma over to Texas and back over its waters, can't you?

A. Yes sir.

Q. In addition to your boat which was brought up the Red River and around the dam and placed on Lake Texoma, you know of other boats, do you not, that have been brought up Red River and taken—

The Court:

There is no use going into that, Mr. Keith, because the Supreme Court of the United States has declared unequivocally that the waters of Red River along that point are not navigable. Now, it may be different about your lake situa-[fol. 121] tion. You didn't navigate this boat up—

A. Sir?

The Court:

You didn't navigate this boat up the waters of the Red River? I know you brought it up the river, but you had to use land force to get it over the bars and things.

A. Yes, sir.

The Court:

You didn't navigate the river in its natural state, did you?

A. No sir.

The Court:

The Supreme Court has declared unequivocally in that Texas-Oklahoma case that the Red River is not navigable in

fact along that portion of it. It may be that it is exceptional as to the lake area.

Mr. Keith:

I had in mind, Your Honor, since the erection of this dam that an entirely different situation had been presented there because of the continuity of the water flow from the dam.

The Court:

All right, you can ask him about the navigation of that boat and you can offer that, but I don't think it has changed the physical situation at all, but it might, but go ahead, but I don't think so.

[fol. 122] Q. In bringing the Wanderer up the Red River, a part of that time at least the boat was operated under its own power, was it not?

A. Yes sir.

Q. And as you approached the dam, got within a few miles of the dam that forms Lake Texoma you operated the boat under its own power on up to that point, did you not?

A. Yes sir.

The Court:

Well, now, let me ask you, how far up the river did you navigate the boat under its own power?

A. Well, sir, there was times that we would get stuck on sand bars, and we had a winch truck along with us that winched us off of sand bars occasionally, but most of the way it come under its own power.

The Court:

All right, go ahead.

Q. And this boat was a 90 foot—

The Court:

What was the draft of this boat?

A. I believe it drew 36 inches loaded. Unloaded it would draw around about 28 inches.

The Court:

What was the width of it and the length of it?

A. 17 foot width and 64 foot 11 inches length.

The Court:

And the draft of it was—

A. Was about 28 inches.

[fol. 123] The Court:

All right. But there were numerous times during that journey that you had to resort to land power in order to get the boat up the river. Is that correct?

A. Yes sir.

The Court:

All right, go ahead.

Q. The boat had an official Coast Guard number when you bought it, did it not, sir?

A. Yes, sir.

Q. And it continued to have an official Coast Guard number at all times, did it not?

A. I believe that is correct, yes sir.

Q. The plans that you made for remodeling and redesigning the boat, you were required by the United States Coast Guard to submit those plans to the Coast Guard for approval, were you not?

A. Yes sir.

Q. And you did submit those plans from time to time, I believe, as you went along there, didn't you?

A. Yes sir.

Q. The Coast Guard inspected the boat before you started this work, did it not?

A. Yes sir.

Q. And after that the Coast Guard inspected the boat at its regular stated intervals of about three months; isn't that correct?

A. Yes sir.

Q. The Coast Guard required you to have the boat operated by licensed pilots, did it not?

A. Yes sir.

Q. And you had two licensed pilots for the operation of the boat, being yourself and your brother Alton; is that correct?

[fol. 124] A. Yes sir.

Q. Prior to the time of the purchase of this boat you had a conversation with Mr. G. A. Cooley of the Citizens National Bank, didn't you, in which you discussed with Mr. Cooley the possibility of your serving liquor on board this boat by reason of the fact that it was to be operated on Federal waters?

A. I don't recall definitely whether I did or whether I didn't.

Q. Now, at the time you purchased this boat you knew, of course, that it was being used for private pleasure purposes?

A. Yes sir.

Q. During the course of remodeling the boat, there were a good many things in there you took out because the Coast Guard required you to take them out, but which in fact were usable, such as the gasoline motors, electric light plant, and a great many things of that sort, did you not?

A. Yes sir.

Q. And in remodeling the boat there were—you took out partitions which were in there and which were usable; various partitions throughout the boat?

A. For scrap, yes.

Q. And those things all were in there at the time you bought the boat at its then value of $9,000.00; is that correct?

A. Yes sir.

The Court:

Let me ask you something. Did you pass any other navigable craft between Texarkana and Denison, either going up stream or down stream, either way?

A. No sir: I don't believe that we did.

[fol. 125] The Court:

All right, go ahead.

Q. At the time, on October 25, 1948, when you and your brother J. H. Wilburn made this loan of $3,000.00 to the corporation,—just before that, it is true, is it not, Mr. Wilburn, that you had asked the Citizens National Bank to loan the corporation additional money on the boat and the bank had refused to do that?

A. Well, I don't believe that they definitely refused, but we seen fit to go ahead and loan the boat money ourselves.

Q. Isn't it a fact that they had a committee from the bank to come out there and look over the boat and inspect the boat, and after they had made their inspection out there, they then told you they didn't care to loan any more money on the boat?

A. I believe that there was something to that effect. I don't know the exact words that was said, but I just don't recall conversation.

Q. That is exactly what they said any way.

Mr. Gullett:

We object to that as irrelevant and immaterial to any issue in the case. It is stipulated—

The Court:

It is stipulated about those loans and the amount of them. You have covered that. He says they didn't get any more money from the bank. Go ahead.

Q. Now, this policy of insurance, Mr. Wilburn, was in favor of Glen, Frank and Henry Wilburn, doing business as Wilburn Boat Company, was it not?

[fol. 126] A. Yes sir.

Q. And you understood from that indorsement that that was the partnership and not the corporation, did you not, sir?

A. At that time it was the partnership. We later incorporated it.

Q. The indorsement to which I direct your attention is dated August 6, 1948, is it not?

A. Yes sir.

Q. And your corporation was formed about July 10, 1948, was it not?

A. Yes, sir.

Q. So you understood, did you not, sir, by this indorsement of August 6, 1948, that the policy was in favor of the partnership and not of the corporation, and so testified at the time your deposition was taken, didn't you?

A. Well, I might have. I don't know. I might have misunderstood your question at the time of the deposition, but at this particular time I was busy and I never paid too much attention to how the indorsement read, but it should have read to the corporation.

Q. When your deposition was taken you were asked this question, were you not, "You understood from reading this indorsement D2A",—and that is the one to which I just referred, was it not?

A. Yes sir.

Q. "That that did not refer to the corporation but that referred to you and your brothers, Glen and Henry, doing business as a partnership under the name of Wilburn Boat Company."—You were asked that question, were you not?

A. Yes sir.

Q. And you answered it "yes sir", did you not?

A. Yes sir.

[fol. 127] Q. Now, on October 21, 1948, this chattel mortgage, which is attached to and forms a part of the stipulation, was executed by the corporation, was it not?

A. Yes sir.

Q. And the bank required you to execute, required the corporation to execute a new chattel mortgage in lieu of the old one executed by the partnership; is that correct?

A. Yes sir.

Q. Wilburn Bros. Boat Company, by whom this is signed, did you intend for that to be the same thing as the Wilburn Boat Company, the corporation, the Oklahoma corporation, which is the plaintiff in this suit?

A. I didn't quite get your question.

The Court:

Well, you have got it there, the name of your company seems to be the Wilburn Boat Company, but he asked you if that instrument signed as Wilburn Bros. Boat Company was intended to be the act of the corporation, the Wilburn Boat Company.

A. Well, yes. It was a corporation of the Wilburn Brothers.

Q. And that was a mistake on your part in stating the name of it as Wilburn Brothers Boat Company instead of the Wilburn Boat Company; is that right, sir?

A. Yes.

Q. And this note that was signed on October 4, 19—

The Court:

Let me ask you a question there. Were you and your two brothers the sole and only owners of the stock in this corporation?

A. Yes, sir.

[fol. 128] The Court:

All right.

Q. That is the only corporation you have had, is it not, Mr. Wilburn?

A. Yes sir.

Q. And when you signed this note of October 4, 1948, you signed it Wilburn Boat, Inc., did you not, sir?

A. Yes, sir.

Q. And that was still the one corporation that you have had that was doing these transactions?

A. Yes sir.

The Court:

You and your two brothers were the only partners in the partnership of the Wilburn Coat Company.

A. Yes, sir.

Q. Excuse me just a moment, Your Honor

The Court:

All right.

Q. I believe that is all.

The Court:

Anything further?

Re-Direct Examination.

By Mr. Alexander Gullett:

Q. Mr. Wilburn, to whom were these checks delivered? You didn't deliver them direct to the Cleaveland Agency, did you?

A. No sir.

[fol. 129] Q. To whom were they delivered?

A. R. L. McKinney Insurance Agency at Denison.

Q. Denison. Do you know what Mr. McKinney does over at Denison, Mr. Wilburn?

A. Yes sir.

Q. What is his business?

A. Insurance business.

Q. Has he written other policies for you for other companies?

A. Oh, yes.

Q. He handles your insurance generally, isn't that correct?

A. Yes sir. He handles 90% of it.

Q. That is all.

The Court:

Have you all made any attempt to settle your differences in this case or not?

Mr. Hayes:

I am sorry, I didn't hear you, Your Honor.

The Court:

I say have you all made any efforts to settle your differences in this controversy or not?

Mr. Gullett:

Yes, I made them a proposition this morning, Your Honor.

(Remainder of discussion along this line omitted.)

Mr. Gullett:

Your Honor, I want to ask Mr. Frank Wilburn one more question.

[fol. 130] The Court:

All right.

Re-Direct Examination of J. F. (Frank) Wilburn continued by Mr. Gullett, as follows:

Q. Now, Mr. Wilburn—

The Court:

I want to ask him one to clear up this record. Now, in order that the record may be clear on this point, after you reached the vicinity of the lake or dam on the lake, there are no locks or canal of any kind entering into the lake from Red River, is there?

A. No sir.

The Court:

And in order to get this boat, the Wanderer, from Red River into the lake you had to skid it on to dry land and skid it across the dry land and then put it into the lake from the dry land approach?

A. Yes sir.

The Court:

All right. All right, go ahead.

Q. Mr. Wilburn, in addition to the accounts shown in these various exhibits that have been introduced in evidence, evidencing the payment of some $22,000.00, did you folks have any other record over there that you kept of monies owed by the boat company?

A. Yes sir, we did.

[fol. 131] Q. How was that kept, please, sir?

A. It was kept in a little book in the store and charged to the boat company.

Q. Has that account been paid by the boat company?

A. No sir.

Q. I hand you herewith what was marked for the purpose of the deposition D-25. Is this the book you are referring to?

A. Yes sir.

Q. How much does that disclose you owe on open account to the store account?

A. $4,708.54, less—Well, I believe 15 underneath it hasn't been added to it.

The Court:

What are those expenditures for?

Mr. Keith:

If the Court please, I am going to object. Every bit of that stuff is included in these two exhiibts already in here.

Mr. Gullett:

Let me straighten that out. That is what I thought originally.

Q. Mr. Wilburn, are any of the amounts shown in the book you have in your hand included in these amounts on the exhibits?
A. No, sir, I don't think so.

The Court:

What is the general nature of those items constituting that amount?

[fol. 132] A. Well, sir, it is labor and material that went into the boat that was paid from our grocery business and charged to the boat company. We kept this in our regular files in the case with the grocery store along with the other.

The Court:

Well, why are you uncertain about whether or not those items are included in these itemized statements that Mr. Keith has questioned you about?

A. Well, sir, the balance that he showed me a little while ago, there, it doesn't correspond with what we have in this boat. I got to checking into it and I found that this balance here on this book is not included in that.

The Court:

And none of these items in this book are included in those itemized statements he had there?

A. Not to my knowledge.

The Court:

Well, to your knowledge——

A. Sir?

The Court:

Well, to your knowledge are they not included in any of those items?

A. Yes sir.

Mr. Keith:

May I have a few moments on that, Your Honor?

The Court:

Yes.

[fol. 133] Mr. Keith:

I went into that pretty thoroughly. I want to be satisfied in my own mind. I believe to save time I will defer examination on this until I have checked into it. I know I went into that fairly thoroughly during the deposition.

The Court:

Let Jake mark that for identification.

Mr. Keith:

Surely. May I have permission to take it with me for the purpose of checking it tonight?

The Court:

Yes.

Mr. Keith:

And the other two exhibits to which it relates?

The Court:

That is all right.

Defendant's Exhibit 6 is marked on book for the purpose of identification only, same not being offered in evidence by the Defendant.)

The Court:

Let me ask you gentlemen one thing in order to clear up this admiralty phase of this matter. You don't make any contention that the upper reaches of the Washita or Red River either are navigable streams in fact, do you?

Mr. Hayes:

How is that?

[fol. 134] The Court:

I mean those that contribute to this lake area.

Mr. Hayes:

Your Honor is asking me that question?

The Court:

I am asking you, but I know the answer to it already. I am talking about the upper reaches of the Red River and the Washita, the two streams that empty into Lake Texoma; no claim is made that those streams beyond the lake area or where the water is raised in them by the lake level, you don't make any claim that either one of those streams is navigable?

Mr. Hayes:

Your Honor has the advantage of me in Your Honor's familiarity with the situation.

The Court:

I do. That claim would be ridiculous, because you can't navigate them in skiffs in their upper reaches, much less a boat.

Mr. Hayes:

I don't know the upper reaches. The only thing, something that I am sure Your Honor is familiar with, is that when water becomes navigable by building a dam, then that water becomes a part of the navigable waters of the United States.

The Court:

Well, that is where I think we differ, because this is just [fol. 135] an inland lake is all it is, and I don't think that it could possibly be construed as navigable waters of the United States, because I am certain that in the authority you cited me there was, if it had any relation to lakes, that it was probably some tributary or channel that either went into or out of the Great Lakes and was a navigable stream in fact, and a continuous body of navigable water, and that is what distinguishes navigable waters within the meaning of the law from these inland lakes. But I know your point, but I don't think that we are operating on admiralty law in this case, but that is no final judgment. I will hear you fully on it, but I want the record made abundantly clear on that, because the upper reaches of the Red River and the Washita are known as a matter of common knowledge in this section not to be navigable in fact. You agree to that, don't you, Mr. Keith?

Mr. Keith:

Your Honor, I have never been on them. I am not much of a fisherman. I have never been on the lake but twice.

The Court:

Well, I thought all the dry landers knew that, but we will have some proof on it if it is necessary. That clears up the admiralty record as far as I am concerned. You all go ahead to other matters.

Recross-examination.

By Mr. Keith:

Q. When you got this boat up to the dam you took it out on the Oklahoma side, didn't you, Mr. Wilburn?

A. Yes sir.

[fol. 136] Q. And about how far were you from the dam at the place where you took it out of the water?

A. About, approximately 600 feet.

Q. East of the dam?

A. Yes sir.

Q. And then you took it around over on the Oklahoma side and put it back into the water there.

A. No sir. We put it in the water on the Texas side.

Q. You skidded it across the dam.

A. Yes sir.

Q. Over to the Texas side and put it in to the lake on the Texas side.

A. Yes sir.

Q. Now, in coming down the Mississippi from Greenville, did you get stuck on sand bars in there?

A. Not on the Mississippi, no sir.

Q. Did you see other boats getting stuck on sand bars in the Mississippi?

The Court:

Well, there is no question about the navigability of the Mississippi, nor about the navigability of the Red up as far as Shreveport.

Q. All right, sir. I was trying to show the existence of sand bars in these other streams. In coming up Red River up as far as Shreveport you got stuck on sand bars up to that point?

A. Yes sir. I believe we had some little trouble there.

Q. And had to get winched off of those as well?

A. Yes sir.

Q. I believe that is all.

The Court:

Anything further?

[fol. 137] COLLOQUY

Mr. Gullett:

That is all. Now, Your Honor, we offer in evidence the depositions of F. B. White and E. H. Rossow, taken in this case. It is a rather lengthy deposition, has lots of correspondence in it. Shall I just have the Court reporter mark it without reading the entire deposition?

The Court:

Well, you can have them marked as being offered in evidence, but if you can, just state to me what you claim to be the legal effect of that testimony.

Mr. Hayes:

Before they are marked and——

The Court:

Before they are offered.

Mr. Hayes:

May I have my objection before they are admitted?

The Court:

Yes sir.

Mr. Hayes:

As to each question separately since he is not taking them separately, as not within the issues as made by the pleadings.

The Court:

All right. I don't know how to rule on that objection until I see what the questions are. Who are these parties and what is their relation?

[fol. 138] Mr. Gullett:

These parties, Mr. F. B. White whose deposition is first, is connected with the Cleaveland Agency, taken at the request of the defendant. The other gentleman is a man by the name of Rossow, who is also connected with the Cleaveland Agency. And my main purpose in introducing the deposition is to show the survey that was made, which was delivered to the company prior to the time of the fire.

The Court:

Well, that was in December of '48.

Mr. Gullett:

Sir, it was made in December of '48, and Mr. Rossow's letter to the Firemen's Fund Insurance Company inclosing

this application and re-survey bears date of February 9, 1949, which was transmitted by the Cleaveland Agency to the Firemen's Fund Insurance Company on February 9th, and the fire did not occur until February 25th. The purpose in introducing that is to show that the company did have notice prior to the time of this fire that the boat was being used for commercial purposes and for charter, that they had knowledge of it.

The Court:

That is the survey that was offered in evidence this morning?

Mr. Gullett:

Yes sir.

The Court:

All right. I will overrule his objection and allow you an exception to that ruling.

[fol. 139] (Depositions of F. B. White and E. H. Rossow, bound in one volume, marked Plaintiff's Exhibit 4, and are omitted herefrom at request of counsel.)

Mr. Gullett:

Now, with reference to proof of loss, I introduce that part——

The Court:

Now, is there any controversy about that being timely filed or about the details of it in any way, except as to amount?

Mr. Gullett:

Yes sir, there is. They have denied in their answer that they ever received a proof of loss and there is one other thing, one other letter in this deposition, Exhibit 4, that was attached by the witness Rossow, which reads as follows: "Denison, Texas, March 23, 1949.

R. L. McKinney Agency,
307 W. Woodward Street,
Denison, Texas.

H. H. Cleaveland Agency,
Western Marine Department,
A-839-175 W. Jackson Blvd.,
Chicago, Illinois.

Fireman Fund Insurance Co.,
San Francisco, California.

GENTLEMEN:

Enclosed herewith please find Sworn Statement in Proof of loss covering the yacht 'Wanderer'.
[fol. 146] Since we have not been furnished as requested a company form proof of loss you will please consider this formal proof of loss.

You are further advised that we are requesting that prompt adjustment be made of the claim as we have suffered loss approximately double the value of insurance carried on the boat.

Will you please let us have your prompt reply.

Yours very truly, (S.) L. G. Wilburn, President, Wilburn Boat Company, a Corporation, and as Partner of Wilburn Brothers, dba Wilburn Boat Company."

It has these notations placed on it. "Ted Note: I talked to Ed Hayes re. this. He wanted proof so I let him have it. Jake."

Mr. Hayes:

That we move to strike out.

The Court:

Well, unless there is some explanation of it, I will sustain the objection to that.

Mr. Gullett:

As to that last part I read?

The Court:

Yes.

[fol. 141]

Mr. Gullett:

All right.

The Court:

Unless it is identified as to the source or connection of the individual making those notations. If that is done, why, it would probably be admissible. But I will sustain your objection to it at this time.

Mr. Gullett:

I will introduce the first Cross Interrogatory propounded to the witness Edward D. Lawson.

"Cross-Interrogatory 1. There is attached hereto a copy of sworn statement and proof of loss in this case and marked 'Exhibit A' for purposes of identification. Will you please state whether or not you have heretofore had occasion to see a copy of this sworn statement and proof of loss and, if so, when and where."

Mr. Hayes:

Just a moment. We object to that.

The Court:

Now, who is Lawson?

Mr. Gullett:

All right, sir. He is in the insurance business, Vice-president and Western Manager of Fireman's Fund Insurance Company.

The Court:

Is that the company involved here?

[fol. 142] Mr. Gullett:

Yes sir, that is the company involved here.

Mr. Hayes:

We object to the question which counsel is, as I understand now, about to read the answer to, and which he read earlier, namely the question about proof of loss. We don't think that that aids the plaintiff in any way or is material to the issues in the case. We also think that the manner of proof of loss is also self serving, which I will indicate if required.

The Court:

It is a question whether or not your company had notice of it. You are claiming they didn't, aren't you?

Mr. Hayes:

So far as the proof of loss is concerned, I think the issue made by the pleadings, as I recall them,—I don't want to be bound by this—was their insufficiency with respect to the office to which they were sent as required by the policy.

The Court:

Well, if your vice-president had notice of this claim of proof of loss, I think that will satisfy it and that is what I understood it to be. I will overrule your objection and allow you an exception to that ruling.

Mr. Gullett:

Answer: "Yes, I have in my office in Chicago. I am attaching a copy of an envelope. This document, which purports to be a proof of loss, was mailed to the Chicago office, although the document itself is addressed H. H. Cleaveland [fol. 143] Agency, which has no office in Chicago but only in Rock Island."—And there is the envelope and the sworn proof.

Mr. Hayes:

Did you read the whole answer?

Mr. Gullett:

Sir?

Mr. Hayes:

Did you read the whole answer?

Mr. Gullett:

Yes, all there was here.

Mr. Hayes:

Did it say something about attached to an envelope?

The Court:

Yes, he did.

Mr. Gullett:

Yes. Here is the envelope attached.

Mr. Hayes:

Then, that is not your statement. That is part of the answer.

Mr. Gullett:

That is exactly what I am talking about. "This document, which purports to be a proof of loss, was mailed to the Chicago office, although the document itself is addressed H. H. Cleaveland Agency, which has no office in Chicago but only in Rock Island.

[fol. 144] Mr. Hayes:

You are offering the envelope I assume.

Mr. Gullett:

Yes, that is part of it. Also I offer that attached purported proof of loss.

Mr. Hayes:

We object to it, of course, on the same grounds.

The Court:

All right, the same ruling.

J. H. Weersing, Plaintiffs' witness, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Alexander Gullett:

Q. What is your name?

A. J. H. Weersing.

Q. Mr. Weersing, what is your business?

A. I am president and manager of Lake Texoma Boat and Dock Company.

Q. What is the business of the Lake Texoma Boat and Dock Comany?

A. Boat repair, storage and boat sales.

Q. Mr. Weersing, how long have you been in business at that location, please, sir, or how long has the Lake Texoma Boat and Dock Company been in business?

A. About four years and five months.

Q. During that period of time, have you had much or little experience in the selling of boats?

[fol. 145] A. Yes, and in that time I have sold 50 or 60 boats.

Q. Will you describe the kind of boats sold by you during that period of time?

A. They run from small inboards up to cruisers 30, 40, 42 feet long.

Q. Are you familiar with the fair cash market value of different types of boats on Lake Texoma?

A. I think so.

Q. Mr. Weersing, did you ever have occasion to be on or be around the boat Wanderer?

A. Yes sir, I have.

Q. Many or few times?

A. Many.

Q. Were you on it when the final repairs were made on it?

A. Yes sir, I was.

Q. I believe those last repairs after the storm were made at your dock company, weren't they?

A. That is correct.

Q. Mr. Weersing, do you have any opinion at this time as to what the fair cash market value of that boat was prior to the time of the fire?

Mr. Keith:

We object to the question, if the Court please, until there is shown there is a market at that place for a boat of such a nature.

Mr. Hayes:

We have the further objection, Your Honor, that it was alleged as a defense here that there was an affirmative statement that these parties had $40,000.00 in this boat. The questions of fair cash market value are not relevant to the pleadings.

[fol. 146] The Court:

Well, I think that goes more to the weight of it than the admissibility of it. I will let him answer the question. Overrule you objection and allow you an exception to that ruling.

Q. What in you opinion, Mr. Weersing, was the fair cash market value of that boat on Lake Texoma at the time it burned?

Mr. Keith:

The same objection.

A. I would say 40 to 50 thoushand dollars.
Q. That is all.

Cross-examination.

By Mr. Keith:

Q. Mr. Weersing, about what is the area of Lake Texoma, expressed however most convenient to you, in square miles or acres?

A. I am more familiar with the number of shore line miles than I am with the area.

Q. Will you give me, what is the number of shore line miles?

A. Approximately 1200 miles.

Q. Now, at its widest point, about what is the width of Lake Texoma?

A. I would say the single longest stretch, straight stretch, of water wouldn't run over ten miles.

Q. And about what is the length of Lake Texoma?

A. I can't answer that question.

Q. Well, what is your best estimate? You have been all over the lake any number of times ,haven't you, Mr. Weersing?

[fol. 147] A. Well, what I am referring to, I just got through saying that the single longest straight stretch of water would be about ten miles.

Q. Well, now, explain that answer. It is a pretty big lake.

The Court:

That is measured in a north and south direction across the main or east area of the lake.

A. I would say from the Washita Point back to the Thompson property would be about ten miles.

Q. That would be north and south, from north to south?

A. Yes sir.

Q. East and west?

A. About six miles.

Q. From the dam you say——

A. I would say from the Oklahoma shore to Preston Peninsula.

The Court:

That is the main body of open water in the lake.

A. That is correct.

Q. About how far beyond that west does the lake itself go?

A. 40 miles.

Q. You have been all over the lake any number of times, of course. You just live out there and that is your business, being on the lake, isn't it?

A. That is right.

Q. What is the situation with reference to the depth of the lake, Mr. Weersing? Explain the depth of the lake to us.

A. It will vary from three feet to 125 feet.

[fol. 148] Q. Now, do you know about how many boats,

just approximately how many boats are regularly kept and used on Lake Texoma?

A. No, I don't.

Q. They run into thousands, don't they?

A. I understand the Engineers have approximately 3400 boats registered.

Q. Now, at your Lake Texoma Boat and Dock Company you have storage facilities for boats, do you not, sir?

A. That is correct.

Q. I don't know whether that is the right phrase for it or not. But about what is the size of the largest boat that you have at your place, sir?

A. 50 feet overall.

Q. And what is the draft of a boat of that sort?

A. That boat draws four feet and eight inches.

Q. Now, about how many other large boats do you have at your place other than that one?

A. 50 or 60.

Q. Now, in addition to your place, there are a good many other places around the lake which also are in this business of selling boats, repairing boats, and providing storage facilities for them, are there not?

A. Correct.

Q. And do those other places have boats of substantially the same size and substantially the same numbers as you have?

A. Yes, they do.

The Court:

So far as your knowledge goes, all these crafts are limited to what is known as pleasure craft, aren't they?

A. Yes sir, they are.

[fol. 149] The Court:

There is no kind of cargo carriers on this lake, are there?

A. There is one that might possibly be classed as such.

The Court:

Well, that is a private undertaking, isn't it, for accommodation of private parties? It doesn't make any practice of

hauling commodities or goods of any kind for hire to the public, does it?

A. They have hauled passengers for hire this past year.

The Court:

Well, but I am talking about goods and cargoes, freight. There is no cargo carrier on the lake, is there?

A. No sir.

The Court:

All right.

By Mr. Keith:

Q. Are you familiar with a boat out there by the name of the North Star?

A. I have never heard of it.

Q. That is not the passenger carrying boat to which you referred?

A. No.

Q. Are you familiar with a boat owned and operated out there by Mr. E. L. Zink?

A. Yes sir.

Q. For what commercial purposes has that boat been used? It has been used to carry cargo, hasn't it, of some sort?

[fol. 150] A. Not to my knowledge.

Q. What are the facts, Mr. Weersing, as to whether there was such a thing in February, 1949, as a market at Lake Texoma for an excursion boat of the type and build of the Wanderer?

A. That is an abstract question and a hard one to answer. About the only indication I can give on that is that I have had inquiries as to the possibility of operating——

Q. But you yourself——

A. —a boat on the lake.

Q. You yourself have had no information or experience—

The Court:

There is not any established market for the sale and purchase of these pleasure boats of this type out there any way, is there?

A. No sir, there is not.

Q. You have had no information or experience, have you, Mr. Weersing, with the purchase or sale of excursion boats such as the Wanderer, have you?

A. Not recently.

Q. Well, had you at any time, say, within a year or two prior to February, 1949?

A. No sir, not sin e before the war.

The Court:

This is the only boat of its type on the river, on the lake; only one that has ever been there, isn't it?

A. Yes sir.

Q. What is the name of the boat you say has been used for carrying passengers for hire?

A. The Pirate.

[fol. 151] Q. About what was the size of that boat?

A. She was 72 or 73 feet overall, formerly the Moulton, belonged to the U. S. Army Engineers.

The Court:

I believe that boat got on this lake by overland transportation, too, originally, didn't it?

A. Yes. It did.

Q. Where did that boat come from?

A. From the Mississippi River.

Q. And what was the draft of that boat?

A. I don't know exactly, but in the neighborhood of seven and a half or eight feet.

Q. And it was used—is it still up there?

A. Yes, it is.

Q. Is it still being used?

A. No sir.

Q. —to carry passengers for hire?

A. No, it is not.

Q. During the time it was so used, did it circulate generally over the area of Lake Texoma?

A. No, it did not. It operated on the Washita, mostly the upper reaches of the Washita.

Q. And the Washita, of course, is over on the Oklahoma side.

A. When I say Washita, if I may I would like to explain it.

Q. I think you had better.

A. It is a colloquialism used on the lake to identify the two branches of Lake Texoma.

Q. You are talking about the Washita Arm of Lake Texoma.

A. That is correct, sir.

Q. And about how far would it be up the Washita Arm of Lake Texoma?

[fol. 152] A. Possibly three miles above the Roosevelt Bridge.

Q. And about how far would that be from the boundary line between Oklahoma and Texas down there in the middle of the lake somewhere?

A. 16 or 17 miles.

Q. And about how far would it operate over toward Texas from the Oklahoma boundary out there in the lake?

The Court:

Pretty thin margin of operation, wasn't it? A mile would cover it, wouldn't it?

A. I believe so.

The Court:

Less than a mile in places, wouldn't it? They didn't have 20 inches there at that east part of the Preston Peninsula. I mean along that high bank where Hannah's place is?

A. That is correct, but the old Moulton very seldom got that far down.

The Court:

It couldn't. It wouldn't have over 20 inches. Not over a mile from there to the dam at the widest point.

A. As long as you stay away from the island there at Burns Run you have got a pretty deep channel.

The Court:

Do you know where that river run before the dam was built?

A. Yes. It run right along Hannah's place, and come along the tip of the peninsula.

[fol. 153] The Court:

Well, the Moulton never did get south of that old river bridge there?

A. No sir.
Q. Would the Moulton get south of the Texas-Oklahoma boundary line is what I am getting at?
A. No.

The Court:

It might down there at the dam.

A. It got over in my bay one time, but it backed out.
Q. Your bay is over on the Texas side, isn't it?
A. Yes sir.
Q. Your bay is south of the Texas-Oklahoma boundary?

The Court:

Yes, it got across the line. There is no question about that, but it didn't in the main body of the lake to speak of.

A. If I may interrupt, stop me whenever you want to. I don't know what you are driving at.

The Court:

He is trying to show that it got across the boundary between Oklahoma and Texas. It did that. It was across the boundary when it was at your place. But in general its operation was along the Washita Arm which is north of line.

A. In the first place, the boat wasn't seaworthy. They didn't dare take it out in the lake, unless it was quiet.
[fol. 154] Q. About how far east and west did the boat travel on Lake Texoma?
A. I have never known it to get out of the main portion of the lake.
Q. That would be about that six mile strip.
A. Yes.
Q. If I understand your testimony correctly,—if I don't you tell me I don't—this boat you are talking about, the

Pirate, formerly the Moulton, carried passengers for hire out there and it went a total distance north and south of roughly about 17 miles, about a mile on the Texas side, and about 16 miles up into Oklahoma, and it would also take a distance of about six miles east and west in the main body of the lake.

A. Well, let's qualify that six miles. In the first place, on the Oklahoma side there in the main portion of the lake the water is too shallow for it to get in to, so it had to go pretty well west of the main body of the lake and it would circle and go on back up to the Washita.

Q. It would take a circling trip to get in the main arm of the Washita, and go up the 16 miles you testified about. I believe that is all.

The Court:

Has it ceased operation now?

A. Beg your pardon.

The Court:

Has it ceased operating?

A. Yes sir. It has. I am not sure whether they are going to attempt to recondition it or not.

[fol. 155] The Court:

But it hasn't been in active operation for sometime?

A. No. I would say five months.

The Court:

And so far as you know that is the only boat that carried any passengers for hire?

A. Outside of small speed boats.

By Mr. Keith:

Q. The reason it is not carrying passengers for hire is because the boat itself has become unseaworthy; is that correct?

A. That is right.

Re-direct examination.

By Mr. Gullett:

Q. They brought the Moulton up there, as I understood a while ago, it was brought up by railroad car, wasn't it?
A. That is correct.
Q. And moved over the Jam.
A. It was brought into the Engineer's Spur and moved over the dam; that is correct.
Q. It was brought in by railroad to the Engineer's Spur and then moved over the dam. Is that correct?
A. That is correct.

The Court:

He said it was brought over by inland transportation.

(Witness excused.)

[fol. 156] COLLOQUY

Mr. Alexander Gullett:

The plaintiffs rest, Your Honor.

The Court:

All right. Are you gentlemen ready to proceed?

Mr. Keith:

May we have a few moments, Your Honor?

The Court:

Well, how long do you think your testimony will require, Mr. Keith?

Mr. Keith:

I think it will require less than a day, Your Honor.

The Court:

Do you have much additional testimony?

Mr. Gullett:

I don't think so, Judge.

(Whereupon Court adjourned until 10 a. m. 12/29/49, and the following proceedings were thereafter had:

The Court:

Are you gentlemen ready to proceed in this matter?

Mr. Keith:

Yes, Your Honor.

The Court:

All right.

[fol. 157] Mr. Keith:

First, Your Honor, on yesterday, as I understand the record, the depositions of F. B. White and E. H. Rossow were just introduced in their entirety by the plaintiffs, and we reserved an objection to each question and answer separately on the ground that the matters were not within the pleadings, not relevant to the pleadings. Now, at this time, having had an opportunity to go into these things separately, I would like to make some specific objections and motions to strike with reference to certain of the exhibits which are attached to these depositions, to the deposition of the witness Rossow.

The Court:

All right.

Mr. Keith:

Rossow Exhibit No. 37, is a telegram of February 25, 1949, from R. L. McKinney Agency to H. H. Cleaveland Agency, reading: "Wanderer: Policy number YA 28579 Wilburn Brothers burned today. Advise if you want us to get adjuster on it. R. L. McKinney Agency." We object to that because it is immaterial to any issue in this case, and it is hearsay as to the defendant.

The Court:

Well, isn't it notice of the loss?

Mr. Keith:

We object to it as being hearsay as to the defendant, Your Honor.

[fol. 158] The Court:

Well, I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

There are certain pencil notations.

The Court:

Well, those pencil notations, unless they are identified as to the source, will be eliminated.

Mr. Keith:

Along similar lines there is another exhibit, being Rossow Exhibit No. 38, of February, a copy of a telegram from H. H. Cleaveland Agency to R. L. McKinney Agency, stating "Have contacted Fireman's Fund regarding loss of Wanderer. They are contacting General Adjustment Bureau, Dallas. H. H. Cleaveland Agency", Dated February 25, 1949. We make the same objections to that, it is immaterial and irrelevant and heresay as to the defendant.

The Court:

Tell me who the Cleaveland Agency is.

Mr. Keith:

That is the agency through which the policy was issued.

The Court:

And they represented the Firemen's Fund?

Mr. Keith:

They were agent of Firemen's Fund while Marshall and Shuler had it.

[fol. 159] The Court:

Do you deny the truth of the telegram?

Mr. Keith:

I don't deny that the telegram was sent.

The Court:

I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

Next one is letter of August 6, 1948, from R. L. McKinney Agency to H. H. Cleaveland Agency, and in addition to the objections which we made yesterday to the letter in its entirety, that it is not relevant to any of the pleadings, not within the pleadings, I want to level a particular objection to two separate parts of that letter. One being a sentence in the third from the last paragraph, reading as follows: "It might be that the Firemen's Fund will want their Dallas Marine man to inspect the boat when this work has been completed.", as being immaterial and being hearsay.

The Court:

Well, what is the whole—who is the letter from?

Mr. Keith:

I am sorry, Your Honor. It is from R. L. McKinney Agency to H. H. Cleaveland Agency, dated August 6, 1948.

The Court:

Notifying them about these alterations and repairs?

[fol. 160] Mr. Keith:

It follows a statement saying that, "These insureds are doing some slight remodelling including the installation of a Marine diesel engine to replace the gasoline engine which has been on the boat."

The Court:

I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

We next object to the next to the last paragraph in its entirety reading as follows: "We have been considering representing the Firemen's Fund for some time and recently made arrangements to represent them and will be glad to contact the Dallas Office if you so desire in this respect.", for the reasons that it is hearsay and constitutes an attempt to prove——

The Court:

Read that again. I want to hear that.

Mr. Keith:

"We have been considering representing the Fireman's Fund for some time and recently made arrangements to represent them and will be glad to contact the Dallas Office if you so desire in this respect."

The Court:

I don't know about that part about recently made arrangements to represent them; unless that is connected up I will sustain the objection to that, because I don't think any agency can be shown by the declarations of the agent.

[fol. 161] Mr. Keith:

Yes sir.

The Court:

I will sustain the objection to that unless it is connected up and the fact of agency is shown otherwise.

Mr. Keith:

Now, we next object to the Rossow Exhibit No. 40, which is a letter of February 25, 1949, from R. L. McKinney Agency to H. H. Cleaveland Agency. We object to the letter as a whole, because it is self serving.

The Court:

What does the letter say in substance?

Mr. Keith:

The letter——

The Court:

Just notifies them about this loss?

Mr. Keith:

Telis them about the loss and contains a lot of recitations in here about how the loss had occurred, what was done and what was known. In other words, it is a recitation of unsworn facts.

The Court:

Well, to the extent that that letter notifies them of the loss, I will overrule your objection and allow you an exception. As to the other, it is probably not material and probably not admissible, and won't be considered unless it is relevant [fol. 162] and its relevancy is pointed out by the other side.

Mr. Keith:

Then we object to Rossow Exhibit No. 41, which is a signed copy of a letter from R. L. McKinney Agency to H. H. Cleaveland Agency, dated May 23, 1949, some few months after the loss, and it is taking up various arguments and so forth about the question of the loss, and we consider the entire letter to be self serving and argumentative and being in point of time wholly immaterial, being communication long after the loss here.

The Court:

Well, is there anything about the proof of loss?

Mr. Keith:

I don't believe there is, Your Honor. No sir. There is nothing about proof of loss.

The Court:

I don't see where that would be material, and unless it is shown to be by the other side, I will sustain the objection to that.

Mr. Keith:

All right, sir. Then we object to Rossow Exhibit No. 42, being a copy of a letter from Mr. Rossow to R. L. McKinney Agency of May 27, 1949.

The Court:

But there is one thing about that letter there that I think is probably admissible, and that is the fact that these representatives of this defendant of yours had notice of the fact [fol. 163] of loss. That is the only extent, but I think that is shown independently and by other evidence, but that is the only purpose for which it could be admissible or will be considered by me. Go ahead. What is the next one?

Mr. Keith:

The next one is Rossow Exhibit No. 42, letter of May 27, 1949, from Mr. Rossow to R. L. McKinney Agency. It is a copy of that letter, and it acknowledges receipt of the exhibit to which we have just objected.

The Court:

All right. To the extent that that shows the fact of knowledge of the loss and claim that was being made for loss, I will admit it. Otherwise, it is probably immaterial.

Mr. Keith:

We object to Rossow Exhibit No. 42, which is a letter from McKinney to Cleaveland Agency of July 8, 1949, for the same reason we have heretofore stated.

The Court:

What does that letter say?

Mr. Keith:

It just says "We would appreciate having any information you have been able to obtain about the status of the loss. We have been under criticism and haven't been able to get any information", and so forth. I don't see where it is material.

[fol. 164] The Court:

I will just consider that for the purpose of showing they had notice of the loss.

Mr. Keith:

All right, sir. And otherwise it will be inadmissible, is that correct?

The Court:

I think so.

Mr. Keith:

We object to Rossow Exhibit No. 44 being a letter of October 21, 1949, being a letter from McKinney to the Cleaveland Agency, reciting that Mr. McKinney had misplaced some claimed letter of transmittal and asking for a copy of it to be sent to him, as being irrelevant to any issue in this case.

The Court:

Is that anything relating to the forms for proof of loss?

Mr. Keith:

No sir. It said, "We have misplaced in our files our letter of transmittal." It says, "1. on the survey" of the Wanderer, was asking for a copy of the letter.

The Court:

And that survey is the Exhibit which has already been offered in evidence. Is that that survey of December, '48?

Mr. Keith:

Yes sir. That is the one that is apparently referred to.

[fol. 165] The Court:

Well, the only purpose that will be considered for will be the fact of showing that they had notice of that proof of survey.

Mr. Keith:

Well, we object to it for consideration on the ground that it is hearsay and self serving.

The Court:

Well, it is not—it is a statement—if it contains any statement by your—

Mr. Keith:

It is an unsworn statement that occurred long after the loss.

The Court:

Well, there is already evidence in the record that Rossow had that copy of that proof of survey. That letter probably wouldn't be admissable for any purpose on that. Now, go ahead if there is anything further.

Mr. Keith:

We object to Rossow Exhibit No. 45, being a letter of October 25, 1949, from McKinney to H. H. Cleaveland Agency, with further reference to that letter we have just talked about, saying they apparently didn't make themselves clear in that, and that they find no letter of transmittal in the file and would appreciate sending this information. We object to that for the same reason we did the preceding one.

[fol. 166] The Court:

Well, I don't see where that has anything to do with it. It is all shown independently and prior to that time.

Mr. Keith:

We object to Rossow Exhibit No. 46, being a copy of letter of October 27, 1949, from Rossow to the R. L. McKinney Agency, stating that this letter we have just been talking about of October 21, 1949, had been sent on to the Firemen's Fund Insurance Company. We object to that as being irrelevant and not within the pleadings.

The Court:

Well, the only purpose of any of that, the only ground of admissibility is the fact that they had notice of this loss, and that is the only purpose for which any of that correspondence will be considered. Now, is there anything else?

Mr. Keith:

Yes sir. There are two or three more of these. We object to—You see, Your Honor, to explain this, the question was—a cross interrogatory was merely asked to just include all correspondence. That is the reason for all this mass being here and our having to go at it in this fashion. We object to Rossow Exhibit No. 47, being copy of letter from E. H. Rossow to Firemen's Fund Insurance Company, of March 2, 1949.

The Court:

1949?

[fol. 167] Mr. Keith:

Yes sir.

The Court:

What does that letter say?

Mr. Keith:

It says, "We are now enclosing a copy of the letter which we received from McKinney Agency outlining the circumstances surrounding the fire." Of course, that is an unsworn statement, hearsay.

The Court:

Well, I am going to admit that for the purpose of showing that this defendant had notice of the loss and only for that purpose.

Mr. Keith:

And there are a number of unidentified pencil notations on there.

The Court:

Well, unless they are connected up, why, they will be disregarded.

Mr. Keith:

All right, sir. Then we object to Rossow Exhibit 48, being copy of letter from Rossow to Firemen's Fund of

May 27, 1949, which transmits the original of a letter received by Cleaveland Agency from R. L. McKinney agency, and asked them to return a correspondence file.

The Court:

Asking them to do what?

[fol. 168] Mr. Keith:

Asking them to return a correspondence file.

The Court:

Well, is there anything in there about form of proof of loss or not?

Mr. Keith:

No sir, there is not.

The Court:

Well, I will admit that and consider it for the purpose of showing notice only to the company of the fact of loss.

Mr. Keith:

I believe that this letter was up yesterday, and I am not certain of it. And at the risk of imposing on the Court we object to Rossow Exhibit No. 49, being a signed copy of a letter from L. G. Wilburn, President Wilburn Boat Company, a corperation, and the partnership DBA Wilburn Boat Company, addressed jointly to R. L. McKinney Agency at Denison, H. H. Cleaveland Agency at Chicago, Illinois, and Firemen's Fund Insurance Company at San Francisco, California, inclosing this proof of loss:

The Court:

What is the date of that letter?

Mr. Keith:

That is March 23, 1949.

The Court:

What is your objection to that?

[fol. 169] Mr. Keith:

My objections to it are that it is not, that it does not transmit proof of loss as required by the policy, and it is self serving; that is the objection to the whole. Then we object specially to a statement in the third paragraph, stating "As we have suffered loss of approximately double the value of the insurance carried on the boat" as being a self serving, unsworn declaration.

The Court:

Well, I doubt the admissibility of that, but I will admit the rest of it. Overrule your objection to that and allow you an exception to that ruling.

Mr. Keith:

Now, there are some pencil notations on there that have not been identified.

The Court:

Well, they will be disregarded unless connected up.

Mr. Keith:

And there is a calling card on it too.

The Court:

I don't think we will regard that calling card, unless it is an invitation to this law suit. Go ahead.

Mr. Keith:

I believe that the others have all been covered. Now, on this application and survey for yacht policy, so called, that was introduced yesterday from the Rossow deposition over our objection, there is at the top of it what appears to be a photostat copy of some pencil notations, which [fol. 170] have not been identified, and we object to them.

The Court:

What are those?

Mr. Keith:

"See letter from agent, February 8th." I don't know whether that word is agent or not. "See letter from"

somebody, "February 9, 1949", which does not form a part of the application for survey.

The Court:

Is that letter identified in the correspondence there, letter of that day?

Mr. Alexander Gullett:

Yes, the letter of the 9th is in there, Judge.

The Court:

Well I don't know. If that notation makes anything in that correspondence intelligible and identifiable, I am not going to eliminate that. Was there a letter accompanying that survey or relating to the survey or explaining the survey in any way?

Mr. Keith:

There is a copy of a letter in here, Rossow Exhibit 50, February 9, 1949, from Rossow to Firemen's Fund, which says that they are enclosing with this copy of this letter an application and survey, but this pencil notation is not shown to have been,—when it was put on there, who put it on there or anything else.

[fol. 171] The Court.

It evidently originated in that office. They had the correspondence before them, but that letter itself shows the notice. I don't think the notation has anything to do with it except it correlates it with that letter and I am not going to eliminate that, because I think it does explain what it relates to on the face of it.

Mr. Keith:

All right.

The Court:

And that was, as I understand it, all that was in the possession of your man Rossow, that survey and that letter that he attached as a copy was in his possession.

Mr. Keith:

This letter is a copy of a letter which Mr. Rossow identified as being in his possession, and this other is a copy.

The Court:

All right, unless that is explained by you, I am going to consider that notation.

Mr. Keith:

I want to resume the cross examination of Mr. Frank Wilburn on that matter we had started yesterday.

[fol. 172] J. F. (Frank) Wilburn, Recalled for further cross examination by Mr. Keith, as follows:

The Court:

You have been over that with him rather fully, but ask him about that exhibit.

Mr. Keith:

This is about that D-25.

The Court:

I understand that.

Mr. Gullett:

I might state in connection with this book about which the interrogation is going to be made, in order to facilitate matters we had the auditors last night go through that book and show what additions are shown in there that were not shown in the original Johnson account just as a matter of facilitating it here. I here now tender it to Mr. Keith, if he would like to see it.

The Court:

What does that show, the items that were not included in the other exhibits?

Mr. Gullett:

Yes sir. Those amounts not included in those original statements.

The Court:

All right.

[fol. 173] Mr. Keith:

I would prefer to go forward in the manner I had proposed.

The Court:

All right, go ahead.

Mr. Keith:

Q. On this Exhibit, Plaintiff's [6] (Mr. Keith refers to this exhibit all the way through his examination as Plaintiff's Exhibit 6, but reporter has marked it for identification only as defendant's Exhibit 6), which is identified as D-25 on the taking of your deposition, you testified yesterday, did you not, Mr. Wilburn, that the amounts shown on here as being still owing to your grocery store were not included within Defendant's Exhibit Nos. 1 and 2, did you not?

A. I believe that I did.

Q. Now, as a matter of fact, referring to Defendant's Exhibit No. 2, which I hand you and I hold this Plaintiffs' Exhibit No. 6 before you, I will ask you if it isn't true, Mr. Wilburn, that the various items that are shown by Plaintiff's Exhibit No. 6, being this book called D-25, are listed on what is shown here as Defendant's Exhibit No. 2 down to and including an item of February 25, 1949, of Texoma Boat and Dock Company, $373.13?

A. Yes, it is. I made an error yesterday on this, and just a part of the book was included in this.

Q. All right. Now, the part that is not included, those are pages that relate to matters that occurred after the loss. That is corect, is it not, beginning March 9, 1949?

A. Yes sir.

[fol. 174] Q. And all the rest of the book releates to matters, expenditures that were made after the boat sank; is that correct?

A. Yes sir.

Q. And all the expenditures that were made up to the time the boat sank are included in this Defendant's Exhibit 2?

A. Yes sir.

Q. Now, inviting your attention very briefly——

The Court:

Now, what expenditures were made in connection with this boat after the loss?

A. Well, sir, I would be glad to read them to you off this book.

The Court:

I thought it was a total loss and it sank out there. Is that correct?

A. Yes sir. There is some outstanding bills that we, that were due on the boat, a few that we paid after the boat had sank, and then there was a barge that we had sold that was deducted from the book and several other items on here that we paid on the bills and credit given on some of the equipment that come off the boat originally before we remodeled it, and I believe it changed the total the sum of somewhere around 1300 dollars more on the book than what Mr. Keith's records showed, although it was put on there after the boat sank.

Q. Now, the biggest item you have got on here after that, Mr. Wilburn, is on June 28, 1949, where you paid to the Citizens Bank over there $2,259.71 on those two notes.

A. Yes sir.

[fol. 175] Q. And you have included that in arriving at this total of $4,710.54, haven't you?

A. Yes sir. And this amount of money now, that was drawn out of our business over there and it was charged back to the boat company.

Q. Yes, but the expenditure of that amount of money has already been shown out of the Wilburn Boat Company account, has it not?

A. I believe that is right, yes sir.

Q. Now, this last item on here, the Texoma Boat and Dock Company, of $373.13, that was just for repairing the boat, damage that had been done to it to put it back in the same condition it was before the damage was done; is that correct?

A. Yes sir. That was a bill paid by me and I turned in a

claim for it to the insurance company and I haven't yet collected on that.

Q. But the purpose of it was just to put the boat back in the same condition it was before it was damaged by that storm.

A. That is right.

Q. Now, on Defendant's Exhibit No. 2, which is largely self explanatory with this notation, but referring to November 23rd, you have an item here, loan $600.00; is that a loan that was made by the Grocery store, grocery company to the boat company?

A. Let's see. If I could think, I could tell you what that is. I know, but I just can't recall just exactly what that loan was for. I know if I could think.

Q. Do you recall testifying—would it refresh your recollection that you testified on your deposition that according to your recollection at that time that was a loan made by the grocery company to the boat company which was spent by the boat company?

[fol. 176] A. I think that is right.

Q. If that is true, that $600.00 would likewise be covered by the expenditures on the boat?

A. Yes sir.

Q. I believe, to refresh your recollection, we found a bank deposit slip showing it had been deposited to the boat company's account.

A. I believe that is correct.

Q. This policy of insurance, you had that in your possession up to the time of the loss, did you not, Mr. Wilburn?

A. Yes, I think so.

Q. And had it in your possession for some few months before that?

A. Yes.

Q. That is all.

The Court:

Any other questions.

Mr. Gullett:

Not from this witness.

Mr. Hayes:

Has the plaintiff rested?

Mr. Gullett:

We rest. We have rested.

MOTION OF DEFENDANT TO DISMISS AND RULING THEREON

Mr. Hayes:

Very good. I have a motion under the rule to dismiss the case, because under the facts and the law, the plaintiffs have not shown a right to relief. And on that motion I would like to be heard pursuant to the practice as stated in 170 Federal (2), 233, Circuit Court of Appeals for the Sev- [fol. 177] enth Circuit, and which I quote if I may. "Defendant contends that at close of plaintiff's case his evidence should be taken in the aspect most favorable."—He was the plaintiff below.—"Together with all reasonable inferences."

The Court:

What is the use of citing anything like that? That is true.

Mr. Hayes:

The thing that the Court holds, Your Honor, is that that is not true. May I finish the reading?

The Court:

All right.

Mr. Hayes:

His view is that the Court should have limited its consideration of the evidence to the narrow limits applicable to the consideration of the evidence in a jury case. Upon a motion by the defendant for a directed verdict at the close of the plaintiff's case, appellee takes the position in which we concur that under Rule 41(B) of the Federal Rules of Civil Procedure, 28 U. S. C. A., upon a motion to dismiss at the close of the plaintiff's case, the Trial Court deter-

mines the fact without being thus limited and must weigh and evaluate the evidence.

The Court:

Well?

Mr. Hayes:

In this case the Trial Court was the trier of the facts and in considering the evidence was not bound to view it in a [fol. 178] light most favorable to the plaintiff with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive, citing the Rule and citing the decisions of the Seventh Circuit, the Ninth Circuit and the Sixth Circuit. In accordance with that practice, if I may, I should like to point out to Your Honor in connection with the evidence as it now stands upon the issue of the navigability of this stream, when this transfer was first applied for by the agent of the assured to the Cleaveland Agency it was stated by that agent, according to the evidence of the plaintiff, that the Red River was a navigable stream, and that enough water was being permitted to come through the dam to make it navigable, more than enough than was required for power purposes.

The Court:

Where is that in the evidence?

Mr. Hayes:

That is in the testimony which the plaintiff has introduced of Mr. White who was the other party to that telephone conversation, the first one who made the representation to the plaintiff's agent, McKinney. It is at page 4 as the deposition is paged by the reporter taking that evidence. It reads as follows:

"McKinney told me—" No.

"At the mention of Red River, I told him * * *", and so forth, "* * * In my letter of June 4, 1948, to the Firemen's Fund Insurance Company, which was our carrier,

[fol. 179] I outlined the plans, and in this telephone conversation Mr. McKinney told me it was their plan to take the Wanderer down the Mississippi River from Greenville and up the Red River and lock it through the Denison Dam". —This is their evidence—"And use the boat exclusively on Lake Texoma. He advised me further that the Red River was a navigable stream up to this point, because they were letting more than enough water through for power purposes at the Denison Dam. He asked me to contact our carrier, which I assured him I would and did immediately do so and confirmed it with a letter of the same date." The letter of that date, June 4th is attached to these depositions, and is Rossow Exhibit No. 4. This is their evidence. In that letter, as was stated, pursuant to that telephone conversation advice was given to this insurer as a basis for the issuance of this policy. That advice was conveyed by the Cleaveland Agency, to whom it had been given, by the agent of these assureds, that the Red River was at that time a navigable stream, because they were letting enough water through the dam, more than enough for power purposes. The letter repeats substantially what I have said. I will not take time to read it. I have it before me. The information we have is that the Red River is a navigable stream up to this point, because, "They are letting more than enough water through for power purposes at the Denison Dam."

Now, there was considerable discussion that was connected with the important case of Texas against Oklahoma, in which a reference was made to the holding of the Supreme Court with respect to the navigability of the Red River. That case is specifically dealt with. And the [fol. 180] law of the subject is well stated from 311 United States, the case of United States v. Appalachian Electric Power Company. The case, in event counsel has the law Edition, is 85 Law Edition, and at page 243 of the Law Edition. That was a case that was decided with one dissent by the Supreme Court of the United States in 19— The Law Edition doesn't give the date. Another reason I don't like them. Mr. Justice Reed delivered the opinion of the Court.

"This case involves the scope of the Federal commerce power in relation to conditions in licenses required by the Federal Power Commission for the construction of hydro-electric dams in navigable rivers of the United States. To reach this issue requires preliminarily a decision as to the navigability of the New River, a water course flowing through Virginia and West Virginia. The District Court's findings that the New River was not navigable was concurred in by the Circuit Court of Appeals after a careful appraisal of the evidence in the record. Both Courts stated in detail the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. The respondent relies upon this Court's statement that: 'Each determination as to navigability must stand on its own facts.'" And upon the conventional rule that factual findings concurred in by two Courts will be accepted by this Court unless clear error is shown. In cases involving navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions, has entered into consideration of the facts found by two Courts to determine for itself [fol. 181] whether the Courts have correctly applied to the facts found the proper legal tests. When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two Court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. The Congress shall have power * * *" —quoting a familiar authority—"* * * to regulate commerce among the several states. It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the navigable waters of the United States open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters. Its power over improvements for navigation in rivers is absolute."

Citing authorities. Commerce between Texas and Oklahoma is interstate commerce under the Federal Constitution. The last sentence is my statement. I make it with confidence. I make it with confidence that neither this nor any other Federal Court either has or would hold to the contrary.

The Court:

Well, don't go too strong on that. You may be speaking for other Courts, but you are not speaking for this one yet. Go ahead.

[fol. 182] Mr. Hayes:

Your Honor, I have a cold this morning and therefore I am having to keep my voice up. It is somewhat unpleasant. I hope you will forgive that aspect of my presentation.

The Court:

That is all right. I can hear you clearly but I will do the speaking for this Court instead of you is the point I am trying to get over to you.

Mr. Hayes:

Well, that, Your Honor, is what I had assumed.

The Court:

Go ahead.

Mr. Hayes:

"The navigability of the New River is, of course, a factual question. But to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union. Both lower Courts based their investigation primarily upon the generally accepted definition of the Daniel Ball. In the lower Courts and here the Government urges that the phrase 'susceptible of being used in their ordinary condition' in the Daniel Ball definition should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements."

That was the Government's argument below, I interpret it. Continuing with quotations:

[fol. 183] "The district Court thought the argument inapplicable. The Circuit Court of Appeals said 'if this stretch of the river was not navigable in fact in its unimproved condition, it is not to be considered navigable merely because it might have been made navigable by improvements which were not in fact made. Of course, if the improvements had been made, the question of fact might have been different."

That ends the quotation of the Circuit Court of Appeals. The Supreme Court goes on:

"To appraise the evidence of navigability on the natural condition only of the water-way is erroneous. Its availability for navigation must also be considered. Natural and ordinary conditions refers to volume of water, the gradients, and the regularity of the flow. A water-way otherwise suitable for navigation is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in Section III of the Water Power Act by defining navigable waters as those which either in their natural or improved condition are used or suitable for use. The district Court is quite right in saying that there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree."

There is a foot note to that statement which reads:

"Thus in the Rio Grande Dam and Irrigation Company case the record contained reports of Army Engineers that improvements necessary to make the river navigable would [fol. 184] be financially, if not physically impracticable, because of the many, many million dollars that would be required."

The Supreme Court of the Territory of New Mexico observed:

"That the navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and expenditures of vast sums of money."

They are referring there and in what immediately follows, and indeed throughout the case, to improvements that have not yet been made as distinguished from the Denison Dam, which is an existing fact. Turning from the foot note back to the text:

"There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable a water-way remains so. This is no more indefinite than a rule of navigability in fact as adopted below, based upon useful interstate commerce, or general and common usefulness for purposes of trade and commerce if these are interpreted as barring improvements, nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate water-way available for traffic. Of course, there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly industrialized region may have been entirely too costly for the same region in the days of the pioneers."

[fol. 185] They are still speaking of improvements which have not been made.

"The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of improvement.

Although navigability to fix ownership of the river bed * * *."

Citing authorities.

"* * * or riparian rights * * *"

Citing Oklahoma vs. Texas, 258 U. S. 574.

"* * * is determined as the cases first cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in Admiralty Jurisdiction which may be extended over places formerly non-navigable. There has never been doubt that the navigability referred

to in the cases was navigability despite the obstructions of falls, rapids, sand bars, carries or shifting currents. The plenary Federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the Federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. In determining the navigability character of the New River it is proper to consider the feasibility of inter-[fol. 186] state use, after reasonable improvements which might be made."

And that concludes the quotation. With respect to reasonable improvements that might be made, it seems that this case bears an obvious—if need be, if Your Honor desires it, I mean I could multiply authority.

The Court:

What is that authority you are reading from?

Mr. Hayes:

The case is the United States vs. the Appalachian Power Company, 311 U. S. on page 377.

The Court:

All right.

Mr. Hayes:

In connection with that authority and before leaving it, it seems to make very plain that the decision of such cases as Texas Against Oklahoma are directed to determining navigability for the special purposes for the ownership of the bed of the stream or riparian rights, whereas navigability in the sense of Federal control and Admiralty control over commerce there carried on is directed, according to the authorities, to the possibility of making it navigable by reasonable prudence.

Whereas, we have on this record by the evidence of the plaintiff an undisputed showing that this is navigable interstate water since the erection of the Denison Dam, an [fol. 187] existing improvement, in which the Federal Gov-

ernment would scarcely have been warranted in engaging aside from this doctrine, and over which it would scarcely be warranted in exercising the control which it does warrant except for that doctrine. So a decision holding that it is not navigable waters would disestablish Federal Agency presently being in control as a matter of cause.

The Court:

No, it has about as much relation to navigation as these desks in this Court room. It is like a lot of that other New Deal camouflage, it is all power. They had no serious thought of navigation except as an incident to the construction of this dam. You might be right on your authority about it being navigable water, but I am very, very suspicious of it. The doctrine that that seems to announce is certainly correct, that it is not to be limited to the stream and its natural condition; that improvements are to be considered, but the point about it is that it relates to the navigability of the stream, the water highway, and that is what this dam conclusively avoided and prevents, because it is an absolute bar to any possible navigation of the Red River as such, because I developed in my questioning there is no question of locks or means of communication from the river to the lake. That dam, —they had to bring this boat and any other one of any size overland to get it in there, and it is just a myth and an optimistic expression of opinion and not a fact when Mr. McKinney told this company that they were releasing enough water from that dam to make Red River navigable. That is just a delusion and myth, because everybody who lives in this vicinity does know or should know that it hasn't had any more effect upon the navigation of Red [fol. 188] River than one of these neighborhood peckerwoods spitting some tobacco in the stream, that outlet of water from the lake, and you have got water which is navigable in fact in the main body of the lake. That is true. But to my knowledge from local conditions, there is no possibility of even any man seriously entertaining the thought that either the Red River or the Washita where they empty as tributaries in this lake are navigable. That is just foolish. You couldn't navigate them in a porogue or skiff in the normal state of them, and the periods of abnormal

water flow, during spring freshets and the like; and I think it is just retching and straining at technicalities to try and contort this purely inland lake, because it is composed of rivers that are not navigable in fact and never were into navigable waters of the United States, and if you are right about it, you will prevail. But it doesn't appeal to my judgment, except as another technicality which has been raised to defeat this contractual obligation which was entered into and without prejudice to your right to renew this motion at the conclusion of all the evidence I am going to overrule it.

Mr. Hayes:

Just a moment, Your Honor, I had a few more words I wanted to say.

The Court:

Well, I want to get all this evidence in and finish the case, and at the conclusion of the evidence you can renew it. I am not convinced of it.

[fol. 189] Mr. Hayes:

Your Honor,—

The Court:

When the evidence is in you can renew it.

Mr. Hayes:

Yes sir. I had addressed myself to one thing, which Your Honor has described as a technicality. I don't think what I will, with permission, will now speak out will strike Your Honor in that light.

The Court:

Well, if you have got any substantial defense on the facts, you will be granted that. But I think you are straining at a rather strained construction to try and make this dam locked inland lake navigable waters. You may be right about it. I am not foreclosing judgment. But I want to get all the testimony, and we can do that without any prejudice to any motion you have.

Mr. Hayes:

I appreciate Your Honor's thought. But in line with the authority I read Your Honor, I beg Your Honor to hear me on one more feature of the plaintiff's evidence.

The Court:

What is that?

Mr. Hayes:

May I refer to the so-called applications and survey which has been mentioned a number of times as supposedly giving notice to the company?

[fol. 190] The Court:

Well, we will take five minutes and then I will hear you.

(Proceedings after recess as follows):

The Court:

All right, proceed, counsel. Should I say "proctor"?

Mr. Hayes:

Forgive me, Your Honor.

The Court:

I say should I say "proctor"?

Mr. Hayes:

I am sorry. I have a cold and did not hear.

The Court:

I was trying to be facetious. I said proceed, counsel, or should I say "proctor"?

Mr. Gullett:

Proctor in Admiralty.

Mr. Hayes:

Oh, oh. I referred to the so-called survey, which is head "Application survey for yacht policy", containing this language, being of date somewhere in December.

The Court:

December of 1948.

[fol. 191] Mr. Hayes:

"Particulars of any mortgages or other encumbrances: None". —Now that document was not a notice that there were $28,000.00 worth of incumbrances against this vessel. It was a matter specifically inquired about. It was answered by the agent of the plaintiffs "None", which was not according to the fact. The fact is stipulated that for months that vessel had been pledged to a bank, first for $10,000.00, then for $20,000.00, and then by the corporation which owned it to two of its stockholders.

The Court:

Let me ask you this.

Mr. Hayes:

—for $8,000.00.

The Court:

Was there anything in this contract of insurance preventing them from mortgaging the vessel?

Mr. Hayes:

Yes sir.

The Court:

What does it say about that?

Mr. Hayes:

It says that "In event the vessel shall be sold, transferred or assigned or pledged without the consent of the—in writing of the insurer", and the stipulation is specific that it was pledged to this bank and also to these two stockholders. And it is specific also that that was without the consent of the insurer, as testified by the witness whose [fol. 192] evidence has been put in as the plaintiff's evidence, Mr. White. That creates a much greater hazard. It is not the same risk. That it is material, it is concluded of course, by the contract which the parties have made.

because as has so often been said Courts do not make the contracts with parties, they enforce those which have been written. These people know what is material to their risk, and I should suppose apart from that doctrine which is a rule of law founded as rules of law generally are, under reason, that it is obvious that a vessel subject to mortgage is subject seriously to a greater moral risk. The Supreme Court's statement on that is particularly clear. The case is Sun Insurance Office vs. Scott, 284 United States, 177:

"The respondents instituted five actions in a Commons Pleas Court in Ohio on as many policies of fire insurance. The causes were removed to the Southern District Court of Southern Ohio, where they were tried together, and resulted in verdict and judgment for respondents. On appeal two of these judgments were reversed, and three here under review were affirmed. We granted certiorari. Each suit seeks recovery upon a fire policy issued upon wool belonging to respondents. In each, defense was made that he placed a chattel mortgage in violation of the provision of the policy as follows: 'This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, if the interest should be other than unconditional ownership or if subject become encumbered by a chattel mortgage.' * * * It is admitted that on June 19, 1926, the respondents executed a chattel mortgage on the insured property to the bank and that the mortgage continued in [fol. 193] force at the time of the fire."

Those matters are all stipulated.

"The policies of the Sun Insurance Office were issued on June 14, 1926. That of the Home Insurance Company bore date of July 6, 1926. * * *

Each of the policies had attached to it a loss payable clause reading substantially as follows:

'Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Company, Cumberland, Ohio, subject nevertheless to all the terms and conditions of the policy.'

These riders were attached by the local agent of the petitioners to the Sun after their issuance; to the Home

policy on the date it was issued. To the petitioners' defense of violation of the chattel mortgage clause the respondents answered:

That the loss payable clause as a matter of law constituted a waiver and a recognition of the interest of the bank. He averred moreover that by custom in the community in which the policies were written such clause was so understood and it was customarily used for the purpose of giving the insurers' consent to chattel mortgages. In the alternative he insisted that under Section 9586 of the Ohio General Code a person who solicits insurance and procures the application therefor must be held to be the agent of the party, company or association thereafter issuing [fol. 194] policy upon such application or renewal thereof, anything in the application or policy to the contrary not withstanding, and that if the loss payable clause did not have the effect for which he contended, nevertheless the agent who wrote the policies and attached the clause, knew of the existence of the chattel mortgage and his knowledge was to be imputed to the insurers and constituted an agreement on their part that not withstanding the mortgage, the insurance should remain in force. To this petitioners replied by denying any such customs as alleged and quoted a provision appearing in each of the policies."

Such a provision appears in this policy.

No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

That ends the quotation from the policy. The Court of Appeals held that under the law of Ohio the chattel mortgage was valid as between respondent and bank not withstanding it had not been recorded, and would have voided the policies except for the loss payable clause which it held either by its own force or by its customary use for the pur-

pose constituted a waiver and consent on the part of the insurers.

[fol. 195] "On this ground we affirmed the judgment. We are of the opinion that upon the uncontradicted facts the petitioners made out a valid defense to the suit and were entitled to directed verdicts in their favor. The provision in the policies prohibiting chattel mortgages without consent indorsed on policy is intended to reduce the moral hazard and is a valid stipulation, the violation of which constitutes a complete defense."

Citing authorities. I pause there to urge Your Honor not with respect to this matter, but at any rate to consider it as artificial, as technical in the driest sense, in view of the fact that such provisions are recognized by the Supreme Court universally in the insurance law, do go to the moral hazard, and boats burdened with no cargo but with $28,000 worth of mortgages are very act or much more apt to sink. The loss payable clause above quoted is not informative to the insurer of the existence of a chattel mortgage, but performs the office of protecting a creditor of the assured who has no interest in the assured's property by mortgage or otherwise against the eventuality of fire loss. They then cite other authorities for it. There is here no loss payable clause. There are here stipulated encumbrances. There is here a plain requirement in the policy it shall be voided unless the consent of the insurer is given in writing. There is here the stipulation that there was no such consent and finally as to the question of notice to the insurer, even were we or could we—were we to or could we disregard the plain provisions of the policy that no waiver can be effective unless it is endorsed thereon in writing—I am speaking of the laws enforced in the Federal Court and other Courts en- [fol. 196] forcing the Admiralty law—there is quite aside from that, and in addition to it and independently conclusively, as it occurs to us, a flat statement in the communication of about the middle of December as to particulars of chattel mortgages, "None". I am not going to enlarge on the necessities of conducting a business according to contracts, because quite apart from argument as to what the law should be in those respects, it is perfectly familiar that the law—that the contracts are enforced by Courts

and not re-made by them. Now, as I said, I have been referring to laws enforced in Federal Court during this complete argument, that this is a marine policy of insurance, which would seem to be too clear for argument once the full state of the authorities is developed. And in performance of my duty to this Court I read to Your Honor from the case of Panama Railroad Company vs. Johnson, 264 U. S. 375, quote:

"As there could be no cases of admiralty and maritime jurisdiction in the absence of some maritime law under which they could arise. The provision * * *"

I interpolate, referring to the provision of the III Article of the Constitution:

"The provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Federation and was commonly applied in the adjudication of admiralty and maritime cases. It embodies the principles of the general maritime law, sometimes called the law of the sea with [fol. 197] modifications and supplements adjusting to scope and need on this side of the Atlantic. The framers of the Constitution were familiar with that system and provided for it instead. The purpose was not to strike down or abrogate the system but to place the entire system, its subjective as well as it- procedural features under national control because of its intimate relation to navigation and to interstate and to foreign commerce."

I interpolate that language is obviously related to that from which I read earlier to Your Honor this morning.

"In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of less light, the provision was regarded from the beginning as implicitly vesting such power in the United States. Commentators took that view. Congress acted on it and the Courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect the substantive law theretofore enforced was not regarded as being abrogated or being only the law

of several states, but as having become the law of the United States, subject to power in Congress to alter, qualify or supplement as experience or changing conditions might require."

That states may not change that law is a familiar doctrine. In the case of vs. , 240 West 273, [fol. 198] "A contract of marine insurance is a maritime contract." Quote from the Belfast case, 7 Wallace 624, 637:

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts. * * * Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty Courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality."

In The New England Marine Insurance Company vs. Dunham, 78 U. S. 90, it was held that a contract of marine insurance is a maritime contract.

The Court said—this is the leading case:

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, by which it is governed. It is well known that the contract of insurance sprang from the law of maritime and derives all its material rules and incidents therefrom."

The Court, I interpolate, traced the history supporting that statement, and concluding:

"That a contract of maritime insurance is a maritime contract", said and I quote:

[fol. 199] "It is in fact a part of the general maritime law of the world, slightly modified, it is true, in each country according to the circumstances."

Can stronger proof be presented that the contract is a maritime contract? I now quote from 49 Federal 2nd, 121, a case decided in 1931 by the Circuit Court of Appeals for the

Fifth Circuit. Certiorari was denied in 284 U. S. 628. I quote:

"Policies of marine insurance are governed by the general admiralty law. In construing them we prefer to follow the decisions of the Federal Courts and other admiralty Courts and put aside decisions of State Courts where they are in conflict."

The Court continues:

"Federal Courts look to the laws of England for guidance in matters of marine insurance and follow them unless, as a matter of policy, a different rule has been adopted". Citing authorities.

"With regard to express warranties there is no difference that we are aware of."

The clause in this case was an express warranty. The English rule is that—

The Court:

What are they dealing with there?

Mr. Hays:

Pardon.

[fol. 200] The Court:

What are they dealing with there in that decision?

Mr. Hayes:

That was a maritime policy in which the express warranty was involved. This is a commercial risk I am speaking of now involved in that case, and the policy carried a warranty that there should be at all times a watchman on board. Of course, what we have here is a pleasure risk and the yacht policy did not carry that warranty, because it carries first the warranty that it shall be for pleasure use, and then the express stipulations that there shall be neither pledge nor sale.

Arnold on marine insurance is cited. Federal Courts have generally adopted this rule. In perhaps the first reported case on this, Genter vs. Nash, which held that a war-

ranty of this kind must be strictly complied with. A case in the Seventh Circuit, Fidelity Phoenix Insurance Company vs. Chicago Title and Trust, 12 Federal 2, at 573. The Court said:

"In the view we take of this question"—

That is the breach of the policy.

"It will not be necessary to note the other conditions. The rule is that a breach of express warranty in a policy of insurance bars the recovery whether it caused the injury or not." Citing Arnold Marine and other authorities. The Court continued:

"The terms of the policy constitute the measure of the insurer's liability".

[fol. 201] I interpolate there and beg Your Honor to consider that it is a—it is upon that statement of the law that premiums are computed, and unless it is enforced, then no actuarial practice is anything but a diversion for idiots unless the terms of the policy are enforced as the limit of liability.

"The terms of the policy constitute the measure of the insurer's liability and in order to recover the assured must show himself within those terms. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery."

Citing authorities. United States Supreme Court and from the Supreme Judicial Court of Massachusetts. Another—I can, and if Your Honor desires, I will multiply authority for these propositions. They are perfectly well settled. Now, I have been speaking on the proposition that this case is governed by the admiralty law.

The Court:

I understand that.

Mr. Hayes:

And I appreciate——

The Court:

And if it should be decided— —

Mr. Hayes:

Pardon me.

[fol. 202] The Court:

If it should be decided that this is not a maritime contract, your authorities probably don't have any persuasion whatsoever.

Mr. Hayes:

I was about to say something addressed precisely to that point, Your Honor.

The Court:

All right, go ahead.

Mr. Hayes:

This policy was mailed from Illinois,—that now appears by the plaintiff's evidence, and a policy is delivered when it is mailed. As I need not repeat, the law which governs that policy, if it is not the admiralty law, is the law of Illinois, where I have been admitted to practice for more years than I now like to count, and which Your Honor knows, as all Federal Courts know the law of all states, judicially, and which I can state to Your Honor, is that there is no modification of the effect of stipulations such as these that we have been discussing in contracts when they are contracts of marine or transportation insurance. Now, whether or not this particular vessel was on admiralty waters does not control the question.

The Court:

Well, you might have something there. That is the thing that has been concerning me most, is the fact that this contract was issued originally, when it was, subject to maritime jurisdiction, because it was issued, as I understand it, when [fol. 203] it was on the waters of the Mississippi River. Is that correct?

Mr. Hayes:

That is correct.

The Court:

Now, that is where you have got something to talk about, admiralty there. I realize that. I have realized that throughout the development of all of this in spite of all this attempt to construct our admiralty jurisdiction on the Texoma Sea. Now, that is where the strength of your position is about your claim of this being an admiralty contract, or a maritime contract, but go ahead. Now, let me interrupt you long enough to ask you, do you intend to rest your case on this testimony which has been adduced, or do you intend to offer any additional testimony? The only thing I want, and you can do it without prejudice to your case, is to develop all the testimony and in the light of that, let this argument be made. But what is the character and trend and length of testimony you propose to offer, if any, if we go on with this testimony? Now, if you are going to rest on their evidence, why we can go ahead and I will listen to you until you are through, but I am anxious to conclude this testimony and get the whole record completed before I make any decision affecting the merits, if that can be done. I get your position fully as far as you have stated it, but if you have anything further, go ahead. I would like to get through, all the testimony that is going to be offered in the record. Put go ahead if you have any further argument to make at this time now.

[fol. 204] Mr. Hayes:

Thank you, Your Honor. There is the further consideration that the owner of the legal and equitable interest in the subject of insurance at the time of the loss, who became such owner in violation of the express terms of the policy forbidding sale, was an Oklahoma corporation. That I think is stipulated, included in the stipulation. Now, the suggestion that has been by inference urged upon Your Honor, and which Your Honor has now, and then indicated that you included in your consideration along with every other possibility while the case was still in trial, was the suggestion that perhaps this contract was governed by the law of the

State of Texas. I have indicated reasons for believing as I do that it is governed by the general admiralty or maritime law. I have indicated reasons for believing as I do that it is governed by the general law of insurance as a maritime contract, regardless of what these waters were. Your Honor has indicated that the issuance of that contract while the vessel was on navigable waters is a significant thing, if like others, it would be the law of the state here. If that contract shows to be delivered in Illinois, why not the law of Illinois, under which these terms and provisions have their full force and effect in every marine and transportation contract, or why not the law of Oklahoma? This contract insured an interest which at the time of the loss was owned legally and equitably by an Oklahoma corporation. Under the law of Oklahoma warranties and other express provisions in contracts such as these we have been considering have their full common law effect. There is no statute in Oklahoma for example, saying that no matter where a policy of insurance is issued, no matter where the insurer is, no matter what [fol. 205] the incidents of the risk may be, regardless of whether the vessel is to be used in interstate commerce as indeed vessels are made to be used and was used under this policy, regardless of where the insurer was, regardless of the making and delivering of the insurance, regardless of anything else, if you insure anybody in Oklahoma, it has got to be the Oklahoma law. The law doesn't say that. It says in no state that I know of except Texas, and I urge upon Your Honor very strongly this further consideration that to construe that state law of Texas or the other laws of Texas as applying so as to rule this situation, would be to claim an extra-territorial effect for them. To do so, to construe those laws as applicable here would be to violate the concept of due process of law made binding upon the states by the 14th Amendment to the Federal Constitution. There is an immense body of authority behind that statement. Here is a vessel that was in Greenville, Mississippi, when this contract was made. And it was a vessel that went places. It wasn't meant to sit still. It came through the State of Oklahoma. It was hauled around on the Oklahoma side, brought across to the Texas side. Then put into waters which border on two states and kept most of the time at a home berth.

That is so testified. It was located in Oklahoma and in Oklahoma it burned and there isn't a word of evidence to indicate that it ever was in Texas except as it may have crossed the state line in going to and from its home berth and to come over here for purposes of repair. That relation for the State of Texas to undertake by its law to govern that vessel, that relation, would be to violate the provisions of the Federal Constitution with respect to due process, to which I have referred. Now, as to the sale of this vessel, [fol. 206] Your Honor was considering the question of whether or not you could go through the corporate entity in order to do justice. There used to be a saying in the days when English chancery was unformed that equity was the length of the chancellor's foot. Unless there is provided by law a standard by which justice may be determined, then to say that a Court of law will go through the corporate entity in order to do justice is to say that the Court will do what is right in its own eyes. We all know that is not so. It is just according to the law to enforce the contracts that parties have made. Justice under the law is the concept which the Courts of the United States have enforced since the beginning, and it is that law that justice requires that the parties, the contracts which parties have made shall be the measure of their rights and not some revision of them, no matter how the revision might appeal to some one else. The parties are the judge of the significance of the provisions that govern their own relations when they are made explicit in a written document. I am fully aware, of course, of a number of state decisions which have more or less taken the view of "Oh, well, of course, he probably didn't read his policy." Something approaching to that.

The Court:

Well, they do have a good deal of fine print sometimes, don't they?

Mr. Hayes:

The doctrine of the Courts of the United States quoted universally is this:

[fol. 207] Lumber Underwriters vs. New York Life, 25[illegible] U. S. 605 quoted and applied in 60 Federal 2nd, 239, at 240, to insurance policies:

"No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. What the assured cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms."

That ends the quotation. There has never been any departure from that doctrine.

The Court:

You know, believe it or not, counsel, I am familiar with that doctrine.

Mr. Hayes:

Pardon me.

The Court:

They are charged with notice of the contents of any contract they entered into. There is no use of taking up time on anything like that.

Mr. Hayes:

Therefore, with respect to going through the corporate entity, unless justice is to be an entirely formulalous thing, not governed by law, justice consists of enforcing the contract and if the contract is enforced, then the sale to the corporation is the end of this law suit, because there is absolutely nothing in this so-called notice to the company about [fol. 208] any sale to any corporation, nor else where. Your suggestion as to going through the corporate entity took me by surprise. I tried to locate something quickly that would bear on it. I have here the case of Strauss vs. the Dubeck Fire and Marine Company of Dubeck, and let me say I didn't find this case. It was Mr. Keith who found it, although we were both looking for it. 22 Pacific Reporter 2nd, 582. I read the headnote No. 2.

"Owners of corporate capital stock named as insured in fire policy covering corporation's property required insured to be unconditional and sole owners, not held entitled to disregard corporate entity to recover."

The suggestion of going to the corporate entity in such a situation as this is, so far as I know, is supported by no authority whatever, and is contrary to the explicit terms of the authority which I read. I would like to, if I may, read——

The Court:

Counsel, that was just a suggestion that was borne out by this testimony, that these three partners were the only owners of the stock in the corporation, and the suggestion that under some circumstances, where it is necessary in order to do justice, that the corporation fiction will be disregarded. I didn't intend to alarm you to the extent of expressing any judgment that would necessarily control in this case, that is a very salutary rule, where it can be done, and where it should be done in order to do justice to disregard the corporate fiction. I don't know whether it has application to this situation or not, except the identity of [fol. 209] interest between the members of the partnership and the owners of the stock in this corporation are identical, but go ahead.

(Recess at this point.)

(Reporter changes Stenograph machines due to fact the one he was using was not working properly.)

The Court:

All right, Mr. Hayes, are you ready to proceed now?

Mr. Hayes:

Yes, Your Honor. We have concluded to let the record close now on both sides.

The Court:

All right.

Mr. Hayes:

There is one important correction of fact, we were both under misapprehension this morning as to a date. Your Honor suggested to me that the date associated with this survey was the middle of December. I think you said December 14th.

The Court:

That was my impression.

Mr. Hayes:

We were in error, sir. The December 14th letter is a letter that says the Wilburns have $40,000.00 invested in the boat. There was, as a matter of fact, not even a request for a survey at that time. The reason for issuing the binder [fol. 210] effective December 20th, which is the date of a telephone conversation between the Cleaveland Agency and the Firemen's Fund, in which the Cleaveland Agency conveyed to the Firemen's Fund the information given in the letter of December 14th, including the $40,000 supposed investment, which we challenge. I say the reason for issuing the binder on that date is amply explained not only by the fact that it was issued on that date, dated effective as of that date, but also the method of writing pleasure risks on hulls is covered by plaintiffs' testimony, their witness White, who explains that with respect to pleasure hulls, they are written entirely on a good faith basis, and the information conveyed by the insured is assumed to be accurate and complete. The only date that is associated in any way directly or indirectly with that survey is the date February 9th. I believe that there was a letter written on February 9th from the Cleaveland Agency, and that letter had an enclosure which was a survey, and that letter is referred to by the plaintiffs' witness Rossow as the one that is associated with the enclosure of that survey. The Firemen's Fund Insurance Company, according to the address, whether it would have gotten there, we don't know on this record. The date is of some significance perhaps. Perhaps not. At any rate, February 9th seems to be the only date associated with it. It is associated with it in that way. The $40,000 increased coverage was asked for in December, bound in December, the indorsement was effective in December; the date is December 20th. Referring to that survey, the only thing in any respect directly or indirectly claimed here to be a notice of any kind to the insurer, respecting the ownership of the vessel, it says Wil- [fol. 211] burn Brothers, Address, Denison, Texas. The fact that the owner legally and equitably was an Oklahoma corporation——

The Court:

Well now, that is just the point that I had in mind about these observations that I have made. Any way you want to construe that, whether it is intended to represent the partnership or whether to represent the Wilburn Brothers individually, they were the beneficial owners of it at that time whether as individuals or through stock ownership. That becomes material upon the question whether there was or was not misrepresentation, but that is the record.

Mr. Hayes:

Your statement, Your Honor, I think——

The Court:

Well, I understand your position about it.

Mr. Hayes:

You said they were beneficial owners. A partner is a proprietor, a stockholder is not.

The Court:

Well, they owned all the stock. You can't get away from that, but I understand. I am not arguing with you, and I am not announcing any judgment, but you construe that as a misrepresentation, and it might be, but go ahead from there.

Not only misrepresentation, Your Honor, but concealment.

[fol. 212] The Court:

All right.

Mr. Hayes:

This policy states expressly that any concealment shall void it. A case which I had occasion to mention this morning and cite was a case in which the name of the party was improperly stated. The averments of the plaintiffs were that they were the owners of the property. The truth was that the property was owned by a corporation. The plaintiffs owned all the stock in the corporation. The Court said:

"It is concealment to neglect to communicate that which a party knows and not to communicate it. One certainly knows his own name."

These plaintiffs did not state their names. The name they did state was both a concealment and a material misrepresentation.

The Court:

That is that Pacific Reporter case?

Mr. Hayes:

It is, sir.

The Court:

All right, sir.

Mr. Hayes:

As far as I am aware, that is uniform authority. I should like to refer to some of the Federal authorities which I neglected to bring over. I had rather a big armful on the doctrine of concealment. They are extensive. That this [fol. 213] was concealment is rather plain and the testimony of the plaintiffs with reference to that, the deposition of their witness White, who had been in the insurance business, including the marine end of it, for many years, since in fact 1928, he said in answer to the question:

"What effect if any, does the provision seem to read: "This entire policy shall be void if the insured has conceded or misrepresented any material fact or circumstances concerning this insurance' ".

The rest of this paragraph is on the risk and premium.

Answer: "The question contains the word 'conceded'. It should be concealed. All hull coverage is written on the basis of good faith, and honesty. The word of the assured or his representative is accepted as truth and completeness as to all exposures that might affect the risk and the company assumes and promulgates their rates and coverage based on this information and the assumption of its accuracy and completeness."

Testifying further, he says with reference to the provision as to sale,

"What significance, if any"—question—' does the provision seem to read, 'It is also agreed that this insurance shall be void in case this policy or the interest of the assured thereby shall be sold, assigned, conveyed without the previous consent of the insurer in writing' "?

[fol. 214] Answer: "The insurance was originally issued for the insured interest shown on the contract. Rates were promulgated accordingly, but with an assignment or transfer of interest the risk immediately changes complexion. As to pledge, as, for instance, by chattel mortgage or other encumbrance, the risk assumes a hazard entirely different from that originally contemplated and certainly a risk that's much greater. These conditions create definitely a moral hazard."

Now, with respect to that provision as to sale, the thing that the evidence shows, and which the Courts recognize, is that moral hazard is important to the insurer. The evidence is as goes to moral hazard, I have read it, some of it, the significance of it with respect to moral hazard must be apparent on reflection when a vessel is owned by a corporation, for example. The only purpose of doing that would seem to be to limit the liability of the assured. That affects the maintenance of the vessel. And the transfer of interest to another interest, particularly corporate interest, is a characteristic of the kind of transaction that the insurer immediately wants to look into. At any rate, the uncontradicted testimony that it goes to moral hazard can hardly be thrown away. The provision is express in the contract. We were speaking this morning of the various kinds of technicalities. That shall be suggested as competitors to the rule in this case. I suppose the thing that may have been in the Court's mind when it referred to that, when it was first spoken of, as perhaps a dryly technical consideration. That was before I had read this evidence. May have been that the sale of the boat doesn't physically set boats on fire. It doesn't physi-

[fol. 215] cally set them on rocks or break their ribs and planking. I suppose that one feature of the Texas law that may have been in your mind was that feature that requires that any breach in the policy must contribute to the loss before it can be relied on by the insurer, a feature which is not the law of the other jurisdictions which I have men-

tioned, which proceed under the doctrine that a man cannot proceed under a contract which he has broken. And the provisions of the Texas law which cannot by their breach—it is held as to those provisions, the Statute of Texas, requiring that the breach contribute to the loss has no application. As for example, an undertaking to pay notes on policies. That doesn't contribute to the loss. The fact that the insured was broke and probably couldn't pay the notes. That may bear on the moral hazard, yes, but it doesn't physically contribute to the loss. As to such a condition as I have described, the Texas Court held, 263 S.W. 659, I quote:

"It is believed that article * * *" so and so, statute I referred to "* * * does not have application to the provision in the suit, since the subject matter of said stipulation from its very nature could not of itself contribute to bring about the destruction of the property by fire. As frequently held * * *" Article so and so. It has reference only to those warranties and provisions, the breach of which might contribute to or bring about a fire loss. It has no application to provisions, violations of which could not from their very nature contribute to or bring about the destruction of the property by fire." So whether this case was covered, as I believe it to be, by the admiralty law, as a maritime contract, or by the Illinois law, the law of the place where it was de-[fol. 216] livered, by the law of Oklahoma, the place where the plaintiff, who is the legal and equitable owner of the property, resides, moves and has its being and by whose law it was created or even by the law of Texas, which I think clearly does not apply, but if it were to apply, still the statutory situation as in this state would not permit a recovery by the plaintiffs under the uncontradicted record as they have made it.

The Court:

Well, now, before we go any further. Will you please tell me whether or not you intend to offer any evidence? You are going to close the record on this as it is or what are you going to do about that? Because as I told you, if there is any more testimony, I want to take it before we have this final argument about the law.

Mr. Hayes:

Yes sir. The plaintiff has rested. In view of that, I stated,—I perhaps didn't make it plain—that we have decided to let this record stand as it is, as the plaintiff has made it.

The Court:

All right. Now, with that understanding, go ahead and proceed with your argument then.—Now, there is one thing that I can say to you now. If this is to be regarded as a maritime contract, I don't think there is any question but what you would and should prevail in this matter; and, of course, I have the apprehension generally that maritime contract is not to be governed by the locality where it was entered into, but it inheres in the nature of the contract, but [fol. 217] the general test of it is simply whether or not it is a contract relating to the navigation and commere and business of the sea. Do we have any different understanding than that about the nature of a maritime contract?

Mr. Hayes:

Your Honor said at sea.

The Court:

Well, I mean navigable waters within that meaning. It doesn't mean technically a body of the outlying water such as is technically at sea, but the navigable waters, if you will, within the meaning of the Constitution. Now, do we have any difference in understanding about our belief and appreciation of what is the nature of a maritime contract?

Mr. Hayes:

If I understand Your Honor's statement, I believe we have none, sir.

The Court:

Well, I think that is correct. But before you go any further, I am going to hear from these gentlemen about what they think is the nature of this contract. You have stated your position very clearly and very fully and I understand everything that you have said, and I would like to hear from

them on what they think they have here in the way of a contract, the nature and the place of it. Are you gentlemen ready to proceed on that?

[fol. 218] Mr. Price:

Our position, if the Court please, is this boat was brought up here on Lake Texoma, which is in no sense navigable waters.

The Court:

That wasn't where your contract was originally bought.

Mr. Price:

They sent this contract down to the agent McKinney, who delivered it to Wilburns at Denison. Our position is that it is a Texas contract, governed by Texas law. Now, if the Court please, Article 5056 provides in part who are agents:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from any company, or who advertises or otherwise gives notice that he will receive or transmit same or who shall receive or deliver a policy of insurance of any such company or who shall examine or inspect any risk, or receive or collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consumating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, aid or adjust or aid in adjusting any loss for or in behalf of any such company. When any such action shall be done at the instance or request of any insurance company or broker, he shall be [fol. 219] held to be the agent for the company for which the act is done", and so forth.

Now, he gets this contract from the Cleaveland Agency and takes it over and makes delivery to the Wilburn Brothers in Denison, Texas. He collects from them by check drawn on a Denison Bank. More than one check. The premium covering that, and transmits it in. He goes out

and examines and inspects the risk and forwarded his survey, which survey reached the general agents in the company's office and was in their office prior to the loss and which survey showed that it was being planned to use it for commercial purposes. In answer to a question, "Purposes for which to be used: Commercial", and, second question, it shows it was to be chartered, and we say that they can't sit up there with written notice, revealed, that is placed in their own files and accept the premium and wait until a loss has occurred and say, oh, well, the policy says you were to use it only for pleasure. Now, then, Article 5054 provides that any contract of insurance payable to any citizen or inhabitant of this state by any insurance company or corporation doing business in this state shall be held to be a contract made and entered into and under and by virtue of this state relating to insurance and governed thereby, not withstanding that any policy or contract of insurance may provide that the contract was executed and premiums on such policy shall be payable without the state to the home office of the company issuing the same.

The Court:

Yes, and all those laws go out the window if this is a contract, a maritime contract.

[fol. 220] Mr. Price:

If the Court please, the only connection this contract has with the Mississippi was that there had been a policy issued to the former owners in Mississippi. A new contract from the beginning was not written but there was no contract with the Wilburn Brothers until they took that contract in Illinois and put indorsements on there making a new agreement with the Wilburn Brothers which became effective upon delivery in Denison, Texas, to them.

The Court:

That is where your trouble is, they didn't make any new agreement and they didn't make any new subject matter of agreement. The only thing that was different from the original contract, as I appprehend the facts and record, is that it indicated different parties as insureds. That is the only difference or change in the contract. And it would not

avail you or any one else to say that the original contract of insurance was not a maritime contract, because it was essentially of that character when it was originally entered into, because at that time this was a completed ship and it was located on admittedly navigable waters of the United States. And the contract had wholly to do with navigation and commerce and it certainly was a maritime contract in its inception. Now, unless there has been some transition affected through this transportation from the Navigable waters to these inland waters, I don't see where the situation has changed, but go ahead with the argument, but the Texas law wouldn't prevail or any other local state law wouldn't prevail or have anything to do with it if this is a maritime contract within the contemplation of the Federal law, because [fol. 221] that is one matter over which the Federal authorities and Federal Courts have exclusive jurisdiction; that is, admiralty and maritime matters, and the state laws wouldn't prevail against them. But go ahead.

Mr. Price:

This contract as effectuated by the indorsement provides that it shall be placed on Lake Texoma, which is not navigable water, and there is nothing sound in the position that because it had once been in navigable water that after it had been removed from them, it would have to still be treated as though it were on navigable waters.

The Court:

Well, there is a whole lot of question in the case right there, but you claim this is a Texas contract, and it is subject to the rules of construction of those contracts in the light that our statutes relate to them. That is your position?

Mr. Price:

That is right, Your Honor. And here with those indorsements was a contract of this company to pay these Wilburn Brothers for damage to that boat, and you look at it in the light of the situation after it had been removed from the Mississippi River and placed on Lake Texoma and they entered into this agreement here in Denison, Texas. That is our position.

The Court:

And of course, you think you are entitled to the whole $40,000 in the event you should recover.

[fol. 222] Mr. Price:

I believe that indorsement on the policy, at which time they agreed that would be the value, would govern in the absence of a plea on their part of fraud and collusion on the part of Wilburn Brothers and Mr. McKinney who sent in that survey. And there has been no such claim or charge made as that.

The Court:

Well, I don't think I can go that far with you, because I think the only thing they are entitled to recover in the event they should recover would be their actual loss in the value of this vessel. And I am very suspicious that doesn't approximate any $40,000. But I think the best disposition of this—You have got some very unusual and novel provisions in this situation and a very unusual situation to say the least, and if you gentlemen don't mind, I think I am going to invite written briefs on this and determine the matter in the light of those. Now, is there any objection to that course?

Mr. Hayes:

On the contrary, Your Honor, I think that it has been mentioned by the Courts that that method of submission of all maritime questions is preferred rather than decision—

The Court:

Well, I think that would be much more desirable. One reason I am inclined to think it is that while my knowledge of admiralty law is not profound, I have had some experience with it and I notice these gentlemen are not prepared on that, and I think they should have an opportunity to reply to your position about that, although these general positions [fol. 223] you announce are generally unassailable if they fit the facts in this situation, and I am very suspicious that they do fit the facts, unless this contract was changed from one of a maritime nature to simply a local contract through the change in position of the location of this boat incident

to its removal from admittedly navigable waters and its dedication to a purpose that might be questionable from a maritime standpoint, although it may still remain a maritime contract. I am not certain about that at all. I would rather—

Mr. Hayes:

Your Honor, if I may judge you for a moment by myself, your interest aroused in this question, you will probably be looking at cases while the briefs are coming in. I have not referred to many cases. May I refer to the early case of Gibbons vs. Ogden?

The Court:

I believe I have heard tell of that case.

Mr. Hayes:

In which it was held—its significance in this case doesn't regularly appear. It is a case of 300 pages. The gist and meaning of that decision is in the statement of Mr. Justice Martin that navigation and commerce are equated where you have interstate commerce on water. You have navigation where you have interstate commerce by that means.

The Court:

I got your position fully and this is essentially interstate movement on that situation between Oklahoma and Texas. [fol. 224] I understand that. I have heard of Gibbons vs. Ogden from my school days on down and I have got every case you have cited here before me, a memorandum of it. I will give you gentlemen a full opportunity to submit this on briefs because there is nothing that an Appellate Court can or will do about it until November and if I pass judgment today I wouldn't have too much confidence in it, because I am uncertain in my own mind about it. But if your position about this being a maritime contract is true, then I think the conclusions that follow from your argument are almost irrefutable and unassailable. But how much time do you gentlemen want within which to prepare your briefs?

Mr. Hayes:

30 days or do we have the burden of the motion? It is our motion to dismiss.

The Court:

You will have the burden, yes. I want you to submit your brief and let them have an opportunity to reply to it. You needn't be urgent about the time, because I probably wouldn't be able to give much consideration to it for a couple of months if I keep up my expected Court room duties for the next two or three months, but I will give you a decision in plenty of time. Whoever is aggrieved by it can appeal to the Circuit Court of Appeals at Fort Worth in November.

Mr. Hayes:

Would it save time if there should be briefs submitted contemporaneously by both sides and each side have a right to reply to the other?

[fol. 225] The Court:

No, you file your brief first. I will give you 45 days in which to file it and them 30 days to reply and then you some time to reply.

Mr. Hayes:

Me some time to reply?

The Court:

Yes sir. You submit your brief in 30 days and I will probably give them 30 days to reply and I will probably give you 10 or 15 days in which to reply to that, and it will be ready for decision in the early part of May or June.

Mr. Hayes:

I suppose if either of us should get short on time, that we can agree on that.

The Court:

I will accommodate you, but I want it decided so there will be no undue delay about the final determination of it on

appeal, if whoever is aggrieved decides to appeal. Is that all, gentlemen?

Mr. Alexander Gullett:

Thank you, Your Honor.

Pages Nos. 137-184 of the Transcript of Trial Proceedings are omitted because they contain typed or photostatic copies of exhibits, the originals of which are transmitted to the Clerk of the United States Court of Appeals under order of Court dated January 11, 1952.

Ruth B. Head, Clerk, U. S. District Court, by Catherine W. Gray, Deputy Clerk.

[fol. 226] PLAINTIFF'S EXHIBIT No. 1

Indorsement made and agreed to this 6th day of August, 1948.

Assured Robert D. Marshall & John Shuler. Location .

Copy of Indorsement

Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read:

Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company.

Otherwise this Policy remains unchanged.

Attached to and forming part of Policy No. YA28579 of the Firemen's Fund Insurance Co.

—— ——, Agent. H. H. Cleaveland, Agency.

Pencil notation: D-2A, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

August 16, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Firemen's Fund Insurance Company [fol. 227] issued to Robert D. Marshall and John Shuler.

Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read:

Glen, Frank and Henry Wilburn d b a Wilburns Boat Company.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. H. Rossow.

Pencil notation: D-2-B, SS 10-18-47.

Western Marine Department
A-838 175 W. Jackson Boulevard
Chicago, Ill.

October 4, 1948 19

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of the fact that the Assured has installed a Diesel Marine Engine = which replaces the gasoline engine in the vessel insured hereunder, there is due and payable, effective October 4, 1948 a r-turn premium of $15.95.

Otherwise this policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

[fol. 228] Pencil notation: D-2-C, SS 10-18-49.

F. B. White.

Established 1868
H. H. Cleaveland Agency
Insurance
Telephone R. 1. 280
3rd Ave. at Eighteenth Street
Rock Island, Ill.

October 27, 1948.

Wilburn Brothers,
Denison, Texas

Re: Fireman's Fund Insurance Co. Policy YA 28579

GENTLEMEN:

Enclosed herewith please find copy of indorsement to attach to the above policy including coverage on a new

Diesel Marine Engine which replaces a gasoline engine. A refund of $15.95 is allowed.

If you have the serial number of the Diesel Engine, would you please advise us for completion of our files?

Thanking you, we are

Yours very truly, H. H. Cleaveland Agency, (S.) E. M. Joens, (T.) (E. M. Joens).

cmj.
encl.

[fol. 229] Pencil notation: D-2-D, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

October 4, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of the fact that the Assured has installed a Diesel Marine Engine # 22441 which replaces the gasoline engine in the vessel insured hereunder, there is due and payable, effective October 4, 1948 a return premium of $15.95.

Otherwise this Policy remains unchanged.

(S.) Wilburn Bros., by J. F. Wilburn, Sec.

Pencil notation: D-2-E, SS 10-18-48.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

December 20th, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of an additional premium of $234.01 it is understood and agreed that the amount of insurance [fol. 230] hereunder is increased to $40,000.00. It is further

understood and agreed that the said vessel, for so much as concerns the Assured by agreement between the assured and Assurer in this policy is, and shall be valued at $40,000.00.

It is further understood and agreed that the lay-up and cancellation clauses are amended as follows:

To return $.25c% per cent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period such period the vessel being at the risk of the underwriters.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return $7.52c% per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return nil per cent. net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival.

Otherwise this policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

Pencil notation: D-2-F, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

July 2, 1948.

Indorsement: Attached to and forming part of Policy No. YA-28579 of the Fireman's Fund Insurance Company, [fol. 231] issued to Robert D. Marshall and John Shuler as their respective interests may appear.

Effective June 9, 1948, it is understood and agreed that the name and address of the Assured hereunder is amended to read: Frank and Henry Wilburn d/b/a Wilburn Bros., Denison, Texas.

In consideration of an additional premium of $166.43 it is understood and agreed that the coverage hereunder is extended to cover full marine perils in accordance with the basic policy. It is further understood and agreed that all paragraphs under the heading "Conditions" are reinstated and made part of this policy.

It is further understood and agreed that the layup and cancellation clauses in the policy are amended to read:

"To return Nil per cent, net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return 11.51c per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return Nil per cent, net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival."

Warranted by the Insured that the vessel be confined to Lake Texhoma.

[fol. 232] In consideration of the premium charged, the navigation limits in the policy are extended to cover a cruise from Greenville, Mississippi via Mississippi and Red Rivers to Denison, Texas and thence locked through to Texoma Lake.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

dp.

Pencil notation: D-2-G, SS 10-18-49.

Fireman's Fund Insurance Company

No. 64966

San Francisco, California

Western Marine Dept.,

Insurance Exchange Bldg.

Chicago 4, Illinois

Renewal Premium $150.00 P & I 116.25.

Policy No. YA-28579.

Amount of insurance $10,000.00 P & I 25,000/50,000 PD 25,000.00.

Renewal Certificate

In consideration of the renewal premium above stated, the said policy issued to Robert D. Marshall and John Shuler as their respective interests may apear, (Number

and name of street) 1337-21st Avenue, (City) Rock Island, (State) Illinois, is renewed for the period from May 22, 1948 to May 22, 1949, subject to the terms and conditions thereof:

Jno. F. Crafts, President.

W. Stanley Pearce, Secretary.

[fol. 233] Countersigned at Rock Island, Ill. this 28th day of April, 1948.

H. H. Cleaveland Agency. (S.) by R. M. Thorpe, Agent.

dp.

Pencil notation: D-2-H, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

August 5, 1947.

Indorsement: Attached to and forming part of Policy No. YA 26896 of the Fireman's Fund Insurance Company issued to Robert D. Marshall and John Shuler, et al.

In consideration of a return premium of $18.76, it warranted by the assured that the vessel insured hereunder was laid up and out of commission from September 14, 1946 to May 22, 1947.

Otherwise this Policy remains unchanged.

H. H. Cleaveland, Agency. (S.) by E. M. Joens.

Pencil notation: D-2-1, SS 10-18-49.

Yacht Policy Policy No. YA 28579

Fireman's Fund Insurance Company

San Francisco, California

Western Marine Department

Insurance Exchange Building

175 West Jackson Boulevard

Chicago 4, Ill.

[fol. 234] Amount $10,000.00 P & I 25,000/50,000 P D 25,000.0.

Rate 1½%.

Premium $15.00 P & I 116.25.

In Consideration of the stipulations named herein and of One Hundred Fifty and no/100 Dollars Premium, Does Insure Robert D. Marshall and John Shuler as their respective interests may appear, hereinafter called the Assured, Whose address is 1337-21st Avenue, Rock Island, Illinois For the sum of Ten Thousand and no/100 Dollars From the 22nd day of May 1947 to the 22nd day of May 1948, Beginning and ending at noon, Standard Time at place of issuance of this policy.

(First of this sentence is marked through with red ink) upon the Hull, Spars, Sails, Materials, Fittings, Boats, including Launches of every description, Furniture, Provisions, Stores, Refrigerating and Electric Light Plants and Installation and all Machinery, Boilers, etc. of and in the good 1931 64' Gasoline Houseboat Yacht called the "Wanderer" or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventure upon the said vessel as above, and shall so continue and endure during the period as aforesaid. Should the above vessel, on the expiration of this Policy, be at sea, or in distress, or at port of refuge or of call, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration of this Policy the Insured shall have given notice in writing of intention to so

[fol. 235] continue) at a Pro Rata monthly premium and it shall be lawful for the said vessel, etc. to proceed and sail to and touch and stay at any port or places whatsoever and wheresoever without prejudice to this insurance. The said vessel, for so much as concerns the Assured by agreement between the Assured and Assurers in this Policy, is and shall be valued at Ten Thousand and no/100 Dollars.

Warranted by the Insured that the vessel be confined to Yacht Harbor, Greenville, Mississippi during the currency of this Policy.

Warranted by the Insured that the within named Vessel shall be laid up on shore and out of commission from ——— to ———.

This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made part of this Policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

Provision required by law to be stated in this Policy.—This Policy is issued by a Stock Corporation.

[fol. 236] In Witness Whereof, the undersigned on behalf of the said Company have hereunto subscribed their names in the City of San Francisco.

Jno. F. Crafts, President.

W. Stanley Pearce, Secretary.

Not valid unless countersigned by a duly authorized Agent of the Company.

Countersigned at Rock Island, Illinois this 22nd day of May, 1947.

H. H. Cleaveland Agency. (S.) by E. M. Joens.

Typewritten note on margin of policy:

Warranted boat carries at least four approved fire extinguishers kept filled and in good working order.

Pencil notation: D-2-J, SS 10-18-48.

Conditions

Warranted by the Assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this Policy and shall not be hired or chartered unless permission is granted by indorsement hereon.

Touching the adventures and perils which we, the Assurers, are contented to bear, and do take upon us, they are of the seas, men-of-war, fire, explosion, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and [fol. 237] countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or qualify soever, barratry of the Master and Mariners, and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of said vessel or any part thereof. And in case of any loss or misfortune, it shall be lawful for the Assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said vessel or any part thereof, without prejudice to this insurance; to the charges whereof the said Assurers, will contribute according to the rate and quantity of the sum herein insured. And it is especially declared and agreed that no acts of the Assured or Assurers in recovering, saving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

With Leave to Sail with or without pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to render salvage services, and to go on trial trips. With leave to dock, undock, and change docks as often as may be required, and to go on slipway, gridiron and/or pontoon, and to adjust compasses.

Warranted Free from loss of or damage to spars and/or sails while racing.

Notwithstanding Anything To The Contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from [fol. 238] capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time or peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike

operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

Warranted Free of loss or damage caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

This Insurance Also, to Cover subject to the special terms of this Policy, loss of and/or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager.

No Recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value.

Not Liable for wages and/or provisions whether the average be particular or general.

It Is Also Agreed, that should any part of the furniture, tackle, boats or other property of the said vessel be separated and laid up on shore during the life of this Policy then this Policy shall cover the same against the risk of fire only [fol. 239] to an amount not exceeding its proportion of twenty per cent (20%) of the amount attaching on hull. The amount attaching on the said vessel shall be decreased by the amount so covered.

In Case of Claim, repairs to be paid without deduction of "New for Old" whether the average be particular or general.

And it is further agreed that if the vessel hereby insured shall come into collision with any other ship or vessel, and the Assured shall, in consequence thereof, become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the vessel hereby insured, we, the Assurers, will pay the Assured such portion of such sum or sums so paid as our subscriptions hereto bear to the value of the vessel hereby insured. And in cases where the liability of the vessel has been contested, with the consent, in writing, of a majority of the underwriters on the hull, and so

forth, (in amount), we will also pay a like proportion of the cost hereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under the collision clause shall be settled on the principal of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision; and it is further agreed, that the principles involved in this clause shall apply to the case where both ves- [fol. 240] sels are the property, in part or in whole, of the same owners, all questions of responsibility and amount of liability as between the two vessels being left to the decision of a single arbitrater, if the parties can agree upon a single arbitrater, or failing such agreement, to the decision of arbitraters, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of underwriters interested in each vessel. The two arbitraters chosen to choose a third arbitrater before entering upon the reference, and the decision of such single, or of any two of such three arbitraters, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Any Agreement, contract, or act, past or future, positive or implied, by the Assured whereby any right of recovery by the Assured against any vessel, person or corporation is released, decreased, transferred, or lost, which would, on acceptance of abandonment or payment of loss by this Company, belong to this Company but for such agreement, contract or act, shall render this Policy null and void as to any such loss, but the Company's right to retain or recover the full premiums shall not be affected.

[fol. 241] It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers.

This Entire Policy Shall Be Void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss.

Warranted By The Assured to report immediately to the nearest office of this Company or to the Agent who shall have issued this Policy every loss or damage which may become a claim under this Policy, and shall also file with the Company, a detailed sworn proof of loss within ninety (90) days from date of loss.

Losses shall be payable in thirty (30) days after proof of loss or damage covered by this Policy, and of the amount thereof, and of the interest of the Assured, shall have been made and presented at the Office of this Company (the amount of premium on this Policy, if unpaid, and all other indebtedness due this Company being first deducted).

No Suit Or Action on this Policy for the recovery of any claim hereunder shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss; provided that where such limitation of time [fol. 242] is prohibited by the Laws of the State wherein this Policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

To Return . . . . per cent, net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters.

Either Party may cancel this Policy by giving fifteen (15) days' notice in writing. To return per cent. net for every fifteen (15) consecutive days of unexpired time of working period and to return per cent. net for every

fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival.

Port Insurance.

On Account of Robert D. Marshall & John Shuler as their interest may appear, Loss, if any, payable in funds current in the United States to Assured or order do make insurance and cause to be insured at and from the 22nd day of May 1947 until the 22nd day of May 1948 beginning and ending with noon Standard Time for Ten Thousand and no/100 Dollars ($10,000.00) upon the 1931 64′ Gasoline House Boat called the "Wanderer" (or by whatsoever other name or names the said vessel is or shall be named or called) her hull, spars, sails, materials, fittings, boats (including launches, steam or otherwise, if [fol. 243] any), furniture, provisions, stores electric light installation and plant, if any, machinery, boilers, etc. valued at $10,000.00.

Touching the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Sea, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what nation, condition or quality soever. Barratry of the Master and Mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said ship &c., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defense, safeguard and recovery of the said ship &c., or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the Rate and Quantity of the sum herein Assured. And it is expressly declared and agreed that no acts of the insurer or the insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or their assigns One Hundred Fifty and no/100 Dollars, being at the rate of one per cent.

Warranted by the Assured that the within named yacht shall be laid up and out of commission, during the currency of this policy at Yacht Harbor at Greenville, Mississippi with leave to dock, undock and change docks as may [fol. 244] be required, and to go on Slipway, Gridiron and/or Pontoon, also to strip, refit and/or fit out and/or to adjust compasses, to load and/or discharge cargo and to move (in tow and/or otherwise) as required within the limits mentioned herein.

This insurance also specially to cover loss of and/or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion howsoever and wheresoever occurring, bursting of boilers, breakage of shafts, or through any Latent Defect in the Machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the Vessel, or any of them, or by the manager.

To pay average without reference to percentage.

In case of any claim for average the repairs to be paid Without Deduction of One-third, whether the average be particular or general.

General average and Salvage charges as per foreign custom, payable as per foreign statement, and/or per York-Antwerp rules, if required; and in the event of Salvage, towage, or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by Arbitration in the manner hereinafter provided for under the "Collision Clause," and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

[fol. 245] Warranted free from Capture, Seizure and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

No recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value.

Held covered in the event of any breach of warranty,

or deviation from the conditions of this policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing.

To Return pro rata per cent, net for every days of unexpired time, if this insurance be canceled, and arrival.

It is also agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred, pledged without the previous consent in writing of the Assurers.

Collision Clause.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel and the assured and/or charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the assurers, will pay the assured [fol. 246] and/or charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby insured. And in cases where the liability of the Ship has been contested with the consent, in writing, of a majority of the underwriters on the hull and/or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners and/or charterers of one or both of such Vessels becomes limited by law, claims under the collision clause shall be settled on the principle of Cross Liabilities as if the Owners and/or Charterers of each Vessel had been compelled to pay to the owners and/or charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured and/or charterers in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same owners and/or charterers, all questions of responsibility and

amount of liability as between the two Ships being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement to the decision of Arbitrators, one to be appointed by the managing owners and/or charterers of both Vessels, and one to be appointed by the majority in amount of Underwriters interested in each Vessel; the two Arbitrators chosen to choose an Umpire before entering upon the reference. The decision, as the case may be, of the single Arbitrator, or of [fol. 247] two Arbitrators, or of the Umpire appointed as above to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured and/or Charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

The terms and conditions of this form are to be regarded as substituted for those of Policy (No.) to which it is attached; the latter being hereby waived.

New York, May 22, 1947.

Port Insurance.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

On Margin: This insurance also covers Fittings &c., (not exceeding 20% of the insured value) separated from the vessel and stored ashore against the risk of fire only.

Notation in Pencil: D-2-L 10-18-49.

[fol. 248] Western Marine Department.

A-838—175 W. Jackson Boulevard.

Chicago, Ill.

May 22nd, 1947

Indorsement: Attached to and forming part of Policy No. YA 28579 issued to Robert D. Marshall and John Shuler As their interests may appear.

Subject to the terms and conditions of this policy, it is agreed that the insolvency or bankruptcy of the in-

sured under this policy shall not release this company from payment of any loss or damage covered under this policy which is occasioned during the term of this policy; and in case, because of such bankruptcy or insolvency, an execution against the insured under this policy is returned unsatisfied in any action against said insured to recover for any loss or damage covered under this policy, then an action may be maintained by the person or persons recovering such judgment or his or her personal representative against this company under the terms of this policy and subject to all the conditions of this policy for the amount of the judgment in such action; but not exceeding, in any event, the amount of this policy.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

Pencil notation: D-2-M, SS 10-18-49.

Form C Revised 3-1-34 (4-1-47).

[fol. 249] Dated May 22, 1947.

In consideration of an additional premium of $116.25 being at the rate of—this indorsement is attached to and made part of Policy No. YA 28579 Fireman's Fund Insurance Company, issued to Robert D. Marshall and John Shuler as their interests may appear.

Protection and Indemnity Clause

And we further agree that if the Assured shall by reason of his interest in the insured ship (or boat) become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and or expenses or shall become liable for any other loss .rising from or occasioned by any of the following matters or things during the currency of this Policy in respect of the ship (or boat) hereby insured, that is to say:—

Property Damage:

(1) Loss of or damage to any other ship or boat or goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused proximately or otherwise by the ship (or boat) insured in so far as the

same is not covered by the running down clause of the Hull policy:

Loss of or damage to any goods, merchandise, freight or other things or interests whatsoever other than as aforesaid, whether on board said ship (or boat) or not, which may arise from any cause whatever:

[fol. 250] Loss or damage to any harbor, dock, (graving or otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever, or to any goods or property in or on the same, howsoever caused:

Any attempted or actual raising, removal or destruction of the wreck of the insured ship or the cargo thereof, or any neglect or failure to raise, remove or destroy the same:

we will pay the Assured such proportion of such sum or sums so paid, or which may be required to indemnify the Assured for such loss, as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured; provided always that the amount recoverable hereunder in respect to any one accident or series of accidents arising out of the same event shall not exceed $25,000.00.

Personal Injury:

(H) Loss of life or personal injury and payments made on account of life salvage, we will pay the Assured such proportion of such sums so paid or which may be required to indemnity the Assured for such loss as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured, provided always that the liability of this Company for claims on account of loss of life and or personal injury and or on account of life salvage is limited to its proportional part of $25,000.00 in respect to any one person and, subject to the same limit for each person, to its proportional part of $50,000.00 in respect to any one accident or series of accidents arising out of the same event.

[fol. 251] Costs:

(III) And in case the liability of the Assured shall be contested in any suit or action, we will also pay our proportion of such ensuing costs as the Assured may incur with the consent in writing of two-thirds in amount of the underwriters.

Notwithstanding the foregoing, this Clause is warranted free from any claim arising directly or indirectly under the Federal "Longshoremen's and Harbor Workers' Compensation Act."

Should this policy be canceled in accordance with its terms by the Assured or by thi Company, return premium under this clause shall be computed as follows:

Where the Hull policy to which this indorsement is attached provides for six (6) months navigation or less, and the premium has been paid, this Company shall return 6% net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the working period and 1% net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the layup period.

Minimum premium to be retained $10.00.

Where the Hull policy to which this indorsement is attached provides for more than six (6) months navigation, and the premium has been paid, this Company shall return 3% net of the annual premium for every fifteen (15) consecutive days of the unexpired time. Minimum premium to be retained $10.00.

[fol. 252] Pencil notation: D-2-X, SS 10-18-49.

Fireman's Fund Insurance Company

San Francisco, California

Atlantic Marine Department

116 John Street

New York 7, N. Y.

(1) In consideration of a premium of nil Dollars ($—), being at the rate of—this Company agrees to insure for the term of one year from May 22, 1947 to May 22, 1948 the

liability of Robert D. Marshall and John Shuler as their interests may appear in respect of the 1931 64' Gasoline Houseboat yacht "Wanderer" which shall arise under the Longshoremen's and Harbor Worker's Compensation Act, being Public Act No. 803 of the 69th Congress, approved March 4th, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

(2) The Company expressly reserves the right to cancel this Policy if the premium is not paid by the Assured within sixty days after the attachment of this Policy by the mailing of notices of such cancellation to the parties enumerated in paragraph five (5) of this Policy and subject to the conditions of said paragraph.

(3) The Company will carry out the provisions of section 35 of said Act. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

[fol. 253] (4) The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders, and decisions of the Federal Security Agency, Bureau of Employee's Compensation and Bureau having jurisdiction, unless and until set aside, modified, or reversed by a Court having jurisdiction of the parties and the subject matter.

(5) This Policy shall not be canceled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer. If this Policy be canceled at the option of this Company pro rata rates will be charged, if at the request of the assured short rates will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

(6) It is understood and agreed that this insurance fully covers the liability of the assured insuring under said Act but in no case does this insurance extend beyond the provisions of said Act.

(7) It is agreed that upon payment of any loss, or damage, or expense the Company is to be subrogated to all the rights of the assured to the extent of such payment.

(8) This Policy is not assignable.

Provision Required by Law to be Stated in this Policy.—This Policy is issued by a Stock Corporation.

[fol. 254] In Witness Whereof, the undersigned on behalf of the said Company have hereunto subscribed their names in the City of San Francisco.

Jno. F. Crafts, President. W. Stanley Pearce, Secretary.

Not valid unless countersigned by a duly authorized Agent of the Company.

Countersigned at Rock Island, Illinois this 22nd day of May, 1947.

H. H. Cleaveland Agency, By (S.) E. M. Joens, Agent.

Pencil notation: D-2-0, SS—10-18-49.

Policy Indorsed on back as follows:

Yacht Policy No. YA 28579 Fireman's Fund Insurance Company, San Francisco, California, Western Marine Department, Insurance Exchange Building, 175 West Jackson Boulevard, Chicago 4, Ill.

Assured: Robert D. Marshall and John Shuler as their interests may appear.

Amount: $10,000.00—Hull 25,000/50,000—P & I.

Premium: 150.0—Hull 116.25—P & I.

Expires May 22, 1948.

[fol. 255] PLAINTIFFS' EXHIBIT 2

Home Fire and Marine Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago—4

May 12, 1949.

E. D. Lawson
Vice-President and Manager

Messrs. Glenn, Franklin and Henry Wilburn
DBA Wilburn Boat Company
Denison, Texas.

GENTLEMEN:

We are now in receipt of two copies of a purported "Sworn Statement in Proof of Loss," apparently signed by you. Apparently the statement attempts to assert a claim against us under our policy YA-28579. It does not do so.

We are returning this statement to you herewith for a number of reasons, some of which are stated below—without waiver however, of any right or defense of this company under its policy contract or otherwise, whether herein expressed or not, all rights and defenses of this company being hereby expressly reserved.

In the statements mentioned on the first page you included the words "Agency at Denison, Texas (R. L. McKinney)," and also the words "to R. L. McKinney Agency, 307 West Woodward Street, Denison, Texas." Apparently you intend these as indications of a person to whom the statement was addressed. Of course the R. L. McKinney Agency is [fol. 256] not an agent of this company and never was. The R. L. McKinney Agency was your broker in connection with a number of transactions touching the policy referred to and was the person to whom you applied to make arrangements for you in connection with the insurance mentioned.

Further we direct your attention to the stipulation of the policy referred to which reads as follows:

"It is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, as-

signed, transferred or pledged without the previous consent in writing of the assurers."

Your statement herewith returned says that the "yacht" Wanderer mentioned in the policy referred to was sold by you to a corporation. The consent of this company was not given (nor even asked) in writing or otherwise to that sale or to any sale, assignment, transfer or pledge of this yacht. Your statement goes on to say repeatedly that you were the owners of all stock of the corporation to which you sold the yacht and we suppose you mean to suggest that this sale therefore was not a sale, which of course is not correct, but beyond that is the further fact which, like the fact of the sale, has come to our attention since the alleged loss of the yacht, namely, the fact that the corporation in which you say you own all the stock transferred the yacht to a bank as security for a loan of $10,000 (a loan which, by the way, seems not to have been paid when it fell due). Again our consent was neither given nor asked to this or any other assignment, transfer or pledge of the yacht. It is apparent that you have violated the stipulation of the policy above quoted and have thereby rendered the insurance void.
[fol. 257] Further, it was represented to us by you through your broker, R. L. McKinney Agency, at the time when the increase in the amount of this insurance to $40,000 was requested, that you had an investment of $40,000 in the yacht, and insurance for $40,000 was asked for on that basis and allowed on that representation. If the purchase price paid by you for the yacht plus repairs and betterments thereto amounted to an expenditure by you of $40,000, then the amount of insurance requested would have been justified, but since the occurrence of the fire referred to in your statement information has come to us which if true would seem to show that you had no such investment in the yacht. You owed us a duty of frank, affirmative disclosure, and you did not perform it.

Moreover, since the fire mentioned, we have been informed that the corporation to which you sold this yacht was organized for the express purpose of operating it for commercial purposes, and that it was so organized at almost the same time that any of you became the assureds on the policy mentioned. That policy provided, under the con-

d-tions reiterated in the same indorsement by which any of you became assured thereon, as follows:

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorsement hereon."

The policy likewise provided:

"This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance [fol. 258] concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss."

Besides this express provision, it is a universal rule in connection with marine insurance policies that the assured is required to disclose to the insurer all facts material to the risk or the premium.

In these connections, it would now appear that this yacht was not acquired or used for private pleasure purposes by you, and that you acquired it for purely commercial purposes. None of this was disclosed to this company. Instead of being solely for private pleasure purposes, as the policy stipulated, it now develops that this yacht represented a commercial venture on your part—a commercial venture that was speculative at best (our information is that it had every prospect of failure). It is one thing to insure three men who can put $40,000 into a yacht for private pleasure, and entirely different thing to insure a corporation with respect to a vessel it wanted only for a commercial purpose and which it mortgaged to raise funds.

We could continue, for it seems that there are other violations of the policy by you, and other defenses of this company. Indeed, it seems likely that there has been another sale or sales of the vessel. But no right or defense whatever of this company under this policy or otherwise, whether of like or different kind to those above referred to, is waived by failure to express it herein, or failure to express it fully, or by any expressions hereof, or by any means whatever, all rights and defenses being expressly reserved.

[fol. 259] Suffice it for the present to say that you asked for $40,000 insurance on a yacht to be used solely for private pleasure purposes, stating you had an investment therein of that amount, which yacht was not to be sold, assigned, transferred or pledged without our written consent. The claim you present is for loss of the yacht belonging to a corporation, pledged to a bank for a loan to the corporation, and acquired for commercial purposes. It will be apparent to you that the policy does not cover that kind of a risk. We insured you three men on a yacht owned by you, free of mortgage debt, to be used solely for private pleasure purposes, in which you gave us to understand you had put $40,000. We did not insure any corporation on any vessel, encumbered or to be encumbered for debt without our consent, or used or to be used as a commercial venture, nor did we insure for $40,000 any commercial vessel in which that sum had not been invested by you.

We refer you to the terms and provisions of the policy; the claim made by you does not fulfill them.

Among other things your "Statement in proof of loss" is insufficient and in that connection also we refer you to the policy.

We reserve all objections to your recovering in any form. We waive none of the rights of this company. We leave you to pursue such a course as you may deem expedient. On the trial of any action you may institute against this company you must come prepared to prove everything, which according to the terms and conditions of the policy, or otherwise, it may be necessary for you to prove in order to recover, and expecting to be met with every defense which this [fol. 260] company has, or may hereafter acquire; and we feel very strongly that upon the real facts you cannot prove what is necessary for you to recover, and that defenses of this company are good.

We return to you herewith the premium you paid, on the express understanding that your acceptance thereof recognizes that this policy is void and that there is no claim thereunder.

Very truly yours, Firemen's Fund Insurance Company, by (Signature unintelligible).

PLAINTIFFS' EXHIBIT 3

Application & Survey for Yacht Policy

(In pencil: "See letter from Agent February 9, 1949.

[x] Fireman's Fund Insurance Company.
☐ Home Fire and Marine Insurance Company.
☐ Western National Insurance Company.

Western Marine Department

Insurance Exchange Building

175 West Jackson Boulevard, Chicago, Ill.

Owner: Wilburn Brothers. Address: Denison, Texas. for: $40,000. upon: river type diesel Yacht called: Wanderer.

Attaching from December 20, 1948 to May 30, 1949.

Warranted laid up and out of commission from ..... to .....

[fol. 261] The following information is necessary.

Occupation of owner Meat Packers. Business address 120 N. Austin, Denison, Texas.

Particulars of any losses sustained by Applicant during past 5 years: August 1948—$341.35 paid.

Cost of vessel to present owner: $30,000 plus $10,000 for engine, lighting & fire fighting equip.

Date and from whom purchased: Schuler and Marshall.

Estimated marked value $40,000. Estimated replacement cost unknown.

Particulars of any mortgage or other encumbrance None.

When built 1931. Where build Rock Island, Ill. By whom built Unknown.

Length 65.0′ B.P. Beam 17.0′. Draft 30″.

Has vessel round, vee or skiff type bottom: skiff type.

State whether cabin, awning roof or open boat cabin.

Has vessel ever been repaired or rebuilt? If so, give particulars and amount expended: yes.

What waters are to be navigated: Lake Texoma, North of Denison, Texas.

[fol. 262] For what purpose is vessel to be used: Commercial.

Is boat ever let, chartered, or used for carrying passengers for hire? Chartered.

Summer location of vessel: Burns Run Resort, Lake Texoma.

Winter location of vessel: Lake Texoma Boat & Dock Co

Where and when may vessel be inspected? Burns Run Resort.

Number and kind of fire extinguishers: See attached.

Describe any cooking appliances on board: 3 Electric Hotpoint appliances.

Location of stove ..... Location of fuel tank for stove .....

Is woodwork around and overhead of stove protected by metal sheeting: Yes.

How many Engines: one. Make of Engine(s): GMC w/Gray Marine Cooler.

Age of Engine(s): New.

No. of Cylinders 6 h. p. 225. Maximum Speed 10 m. p. h. Price paid if purchased separately $5,000.

[fol. 263] Is Engine in enclosed compartment? If so, state how ventilated: Yes—windarm air scoops under bilge.

No. of tanks: one. Material of tanks: steel. Where located: Forward. Engine: Gallons capacity: 250.

In spilling gasoline when filling does it drain to bilge or overboard? Overboard (Diesel Oil).

Does propeller extend below line of keel: wheel—no.

Is there a guard under it——

Number of anchors 3. Weight 125—bow. Length and size of chain and/or rope 150″ wire rope ⅜″ 150 manila 1½″.

The above statement, made and signed by the owner or owners for insurance warrants the informations set forth as correct.

This is submitted to establish the actual character and condition of the vessel, and is to be used as the basis on which the insurance is granted.

This insurance is subject to the terms and conditions of the Policy used by the Assurers at this date.

Dated —— —, 19—, at ———.

Signature of owner:

(S.) J. F. Wilburn.

Address: ———.

(See other side.)

[fol. 264] When surveyor is employed, the following additional information is necessary. If no surveyor is employed, the Applicant is requested to complete as much as possible.

Construction and General Arrangement; Material of hull, frames, size and spacing, fastening. Short description of exterior and interior lay-out with notation of kind of wood and finish:

Large cabin—17 x 35—hardwood floor.

Toilets—men—starboard aft of main cabin.

Toilets—ladies—port aft of main cabin.

Engine Room—rear of toilets 17 x 10.

Equipment:

Is vessel equipped according to her class? Yes.

Describe—sails ——— Boats: 1 boat 16 ft. 4 floats—25 passengers.

Spare Propeller —— Lights ——.

Engine, Etc.

Describe engine location and state whether under deck or enclosed in casing: Main deck aft.

Has carburetor backfire trap? Yes. Drip pans? Yes.

Describe location of batteries. Enclosed in lead line case below engine room.

[fol. 265] Describe condition of electric wiring. All in rigid cable.

Are bilges free from gasoline and oil? Yes.

Has engine self-starter? Yes.

Further details of engineroom ventilation: Windows 2 x 4 outlets.

Further details of fuel tank ventilation: vented to outside and above deck.

Particulars of an auxiliary engine and its fuel tank: No auxiliary engine.

General Condition and Upkeep:

Excellent.

Details of crew and experience of person usually in charge: The pilots have had from one to two years experience on large boats and several years experience on small boats. James F. Wilburn and Alton J. Wilburn, the pilots have commercial operators licenses which were issued permanently Oct. & Nov. respectively last year after they had had temporary licenses.

Remarks of Surveyor:

W. E. Blackshear the engineer has had several years experience with marine motors. There are 2 large Co2 cylinders which have connections in the bilge and fuel tank compartment. There are 4 water tight bulkheads evenly [fol. 266] spaced across the entire length of the boat with a bulkhead in the bow. R. L. McKinney, Jr., Agent in Denison made the survey on the boat and can give you any desired information. We have attached a survey made by L. M. Fellows of New Orleans on January 19, 1948, which will give the information of the boat before the changes were made this last year. In other words, the individual cabins were taken out and made into 1 large room. The large range which was in the galley has been removed since only Hotpoint appliances are being used. Where the center cabin was removed a steel beam was put under the top deck giving it additional support. At the present there is an oil circulator in the main room on the first deck which is used for heat. It is vented and has a metal floor board underneath it. The stove is securely fastened to the deck and side so that it cannot move. There is a small container for fuel oil attached to the stove and no extra oil for the stove is carried aboard.

Attached is a slip with the following:

Fire Extinguishers:

1 quart "Fire Gun, Model O.
1 two gallon foam type extinguisher.

2 CO2 Extinguishers.
2 Fire hydrants and pumps with 50 feet of hoses.
2 Five Pound CO″ extinguishers.
4 quart size tetrachloride extinguishers.

(Here follow 2 pasters, side folios 267, 268)

[fol. 267]

DEFENDANT'S EXHIBIT 1

Wilburn Boat Company, Recap of Checks Drawn

Date 1948	To Whom Paid		Amount Check	Labor Contractors Etc.	Equip.	Plans Etc.	Supplies	Dock Equip.	Sundry	
Aug. 5	Texoma Boat & Dock Co.		$ 510.99	$ 510.99	$	$	$	$	Ldy	$ 4.25
Aug. 7	Wilburn Bros. Co.		2,138.89	345.75*	180.48		38.85		U. S. Engineers Tulsa	101.52
	Timing Gear	100.00							Tel. Calls	34.49
	Geo. Clark	38.88							Travel	1,380.55
	Foster Mill	41.60							Organ. Expense	53.00
Aug. 5	H. H. Cleveland Agency 5022-49		419.56						Ins.	419.56
Aug. 7	Head & Head Contrs.		500.00	500.00						
Aug. 7	W. E. Blackshear		77.91	77.91						
Aug. 7	Alton Wilburn		27.00	27.00						
Aug. 8	J. W. Roberts		45.00	45.00						
Aug. 10	Farmer Jones		29.90				29.90			
Aug. 12	J. Roberts		11.90	11.90						
Aug. 17	Neilan Bemis		200.00			200.00				
Aug. 18	Alton Wilburn		35.00	35.00						
Aug. 20	J. C. Hogan		18.00	18.00						
Aug. 21	W. E. Blackshear		91.16	91.16						
Aug 21	Head & Head		500.00	500.00						
Aug. 23	R. J. Bullock		24.00	24.00						
Aug. 25	Wilburn Bros.		314.56	137.30		Frt.	.90		Gas & Oil	156.55
									Misc.	1.50
									Tele.	2.31
									Adv.	16.00
Aug. 27	Central Freight Lines		2,453.20		2,453.20					
Aug. 28	Bireleys Beverage Co., Cooler		59.80		59.80					
Aug. 28	Peter Spears		18.88	18.88						
Aug. 28	R. L. Williams		29.40	29.40						
Aug. 28	W. E. Blackshear		44.55	44.55						
Aug. 30	H. H. Hodge Life Preservers		70.00		70.00					
Sept. 2	Head & Head		500.00	500.00						
Sept. 3	W. E. Blackshear		44.55	44.55						
Sept. 9	Central Freight lines, Frt. on Motor		134.17		134.17					
Sept. 11	Alton Wilburn		22.00	22.00						
Sept. 11	W. E. Blackshear		44.50	44.50						
Sept. 13	Citizens National Bank		141.67						Interest	141.67
Sept. 16	Herb Dennis		62.82	62.82						
Sept. 17	W. E. Blackshear		44.55	44.55						
Sept. 18	Alton Wilburn		20.00	20.00						
Sept. 18	Jack Miller		10.00						Adv.	10.00
Sept. 18	Texoma Boat & Dock Co.		53.30						Rent	53.30
Sept. 25	W. E. Blackshear		44.55	44.55						
Sept. 25	Alton Wilburn		20.00	20.00						
Sept. 27	Hardwicke-Etter Co. Rake		27.54		27.54					
Oct. 2	W. E. Blackshear		44.55	44.55						
Oct. 2	Alton Wilburn		20.00	20.00						
Oct. 2	Jack Miller		15.00						Adv.	15.00
Oct. 7	Collector of Customs		82.18						Boat Admeasurement	82.18
Oct. 8	Jack Miller		4.00						Adv.	4.00
Oct. 8	R. A. Trail		60.00	60.00						
Oct. 9	W. E. Blackshear		48.95	48.95						
Oct. 9	Alton Wilburn		20.00	20.00						
Oct. 14	Grayson Fire Ext. Co. Fire Hose		26.42		26.42					
Oct. 14	Roy Paul		250.00						Organ. Exp.	250.00
Oct. 18	W. E. Blackshear		44.55	44.55						
Oct. 18	A. F. Wilburn		20.00	20.00						
Oct. 20	Henry Wilburn, Bemis		100.00			100.00				
Oct. 20	Citizens National Bank		125.00						Interest	125.00

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DEFENDANT'S EXHIBIT 1

Wilburn Boat Company, Recap of Checks Drawn

Date 1948	To Whom Paid		Amount Check	Labor Contractors Etc.	Equip.	Plans Etc.	Supplies	Dock Equip.	Sundry	
Oct. 22	Head & Head Cont. Wilson Walters Settlement on Contract		600.00	$ 600.00	$	$	$	$		$
Oct. 23	W. E. Blackshear		46.65	46.65						
Oct. 25	New Way Grocery		1,442.40*	46.66	*799.62		120.45		Gas & Oil	148.42
	Fire Ext.	152.15			Frt. 9.60				Tel.	42.78
	H&P. Hdwe.	339.45							Dock Expense	198.21
	Mattress Co.	18.00							Accounting	38.62
	Geo. Clark	120.35							Adv.	13.00
	Gen. App.	5.36							Postage & Office	25.04
	Chris Waltz	164.31								
Oct. 25	Alton Wilburn		22.00	22.00						
Oct. 27	Neilan Bemis		250.00			250.00				
Oct. 30	W. E. Blackshear		44.55	44.55						
Oct. 30	Alton Wilburn		20.00	20.00						
Nov. 1	Wilburn Bros. Gro.		3,762.12*	40.00	2,739.96		45.58		Gas & Oil	19.73
				11.87	35.12				Travel	109.56
					Motor	Expr.				
Nov. 2	Koeppen-Baldwin Re-wiring & 2 water pumps		2,065.21		2,065.21					
Nov. 2	Texoma Boat & Dock		37.24						Rent	37.24
Oct. 25	L. B. Wilburn		48.00				48.00			
Nov. 6	Alton Wilburn		20.00	20.00						
Nov. 6	W. E. Blackshear		29.68	29.68						
Nov. 8	Charlie Clark. Ramp Walk & pump-stiff arms & etc.		479.38					479.38		
Nov. 9	Gullett & Gullett		30.75						Organ. Exp.	30.71
Nov. 12	Citizens National Bank		.50						Office	.50
Nov. 18	Citizens National Bank		1.13						Office	1.13
Nov. 25	*Deputy Collector of Customs*		4.00			4.00				
Nov. 22	W. E. Blackshear		48.88	48.88						
Nov. 27	Alton Wilburn		38.00	38.00						
Nov. 27	Alton Wilburn		20.00	20.00						
Dec. 3	First Christian Church 66 Chairs		66.00		66.00					
Dec. 6	Alton Wilburn		20.00	20.00						
Dec. 8	Koeppen-Baldwin, Plumbing		25.78		25.78					
Dec. 14	Alton Wilburn		20.00	20.00						
Jan. 1	Citizens National Bank		250.00						Interest	250.00
	Total		$19,042.27	$5,266.15	$8,693.20	$554.00	$283.68	$479.38		$3,765.86

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DEFENDANT'S EXHIBIT 2

Wilburn Boat Company, Unpaid Expenses

Due New Way Grocery for Checks Drawn for Boat Co. Expense:

Oct. 25	Meals	Miscellaneous	$ 2.35
Oct. 25	Light Bulbs	Supplies	.30
Oct. 26	Office Expense		1.95
Oct. 26	Light Bulb	Supplies	.18
Nov. 1	Charlie Ingram	Gas & Oil	8.57
Nov. 2	V. S. Scoggins	Gas & Oil	28.27
Nov. 2	N. B. McClure	Gas & Oil	7.14
Nov. 10	Telephone Bill	Telephone	17.07
Nov. 10	Gulf Oil Corp.	Gas & Oil	10.36
Nov. 10	Texas Co.	Gas & Oil	9.25
Nov. 10	Texas Co.	Gas & Oil	4.29
Nov. 10	Sinclair Refining Co.	Gas	35.97
Nov. 10	Lingo Leeper	Material & Supplies	144.42
Nov. 10	Chris Waltz	Material & Supplies	23.30
Nov. 10	Hawkins Hdwe.	Material & Supplies	7.40

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Nov. 10	Sherman-Dension Concrete Co.	Material & Supplies	44.80
Nov. 10	Farmer Jones	Material & Supplies	11.35
Nov. 10	Telephone	Telephone	3.05
Nov. 12	Charlie Ingram	Gas & Oil	7.00
Nov. 17	Oxydol	Miscellaneous	.35
Nov. 18	Purchases	Groceries	14.34
Nov. 19	Bryson	Signs	15.00
Nov. 19	Miscellaneous	Misc.	1.30
Nov. 20	Purchases	Purchases (Gro.)	2.41
Nov. 20	Battery	Miscl.	.20
Nov. 15	Cash—Floats	Equipment	918.32
Nov. 16	Freight—Life Preservers	Equipment	16.32
Nov. 13	Blackie—Labor	Labor Operating	22.50
Nov. 21	Mdse. Purchased	Purchases	19.22
Nov. 21	Pans	Supplies	4.00
Nov. 24	Mdse. Purchased	Purchases	7.37
Nov. 24	Postage	Office	1.29
Nov. 25	Purchases	Purchases	.21
Nov. 23	Loan		600.00
Nov. 23	Purchases		5.05
Dec. 4	Purchases		19.10

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Dec. 4	Telephone		.66
Dec. 6	Roach—Wages	Labor—Operating	6.00
Dec. 9	Merchandise		1.50
Dec. 9	Typing Paper	Office Expense	.10
Dec. 2	Ingrams Serv. Station	Gas & Oil	1.30
Dec. 6	Briggs Weaver	Material & Supplies	42.07
Dec. 6	Donovan Boat Supplies	Equipment	197.25
Dec. 7	N. B. McClure	Gas & Oil	6.43
Dec. 4	Blackie—Labor	Labor—Operating	11.25
Dec. 13	Denison Herald	Adv.	25.20
Dec. 13	Telephone	Telephone	15.00
Dec. 13	Farmer Jones	Material & Supplies	16.04
Dec. 13	Koeppen-Baldwin	Material & Supplies	15.00
Dec. 13	Chris Waltz	Material & Supplies	.30
Dec. 13	Geo. W. Clark	Material & Supplies	21.65

DEFENDANT'S EXHIBIT 2—Continued

Wilburn Boat Company, Unpaid Expenses

Due New Way Grocery for Checks Drawn for Boat Co. Expense:

Dec. 13	Foxworth Galbreth	Material & Supplies	83.20
Dec. 13	Texas Hardware	Material & Supplies	3.29
Dec. 13	Grayson Fire Ext. Co.	Material & Supplies	5.65
Dec. 13	Taylor Printing Co.	Office Supplies	5.75
Dec. 13	Lingo Leeper	Material & Supplies	19.71
Dec. 17	Citizens Nat'l Bank	Interest	125.00
[fol. 272]			
Dec. 13	Pilkiltons Garage	Misc'l.	1.23
Dec. 18	Blackie	Operating Labor	14.00
Dec. 23	Freight—Life Jackets	Equipment	2.72
Dec. 31	Merchandise		4.15
Dec. 23	Texoma Boat & Dock	Rent	64.00
Jan. 7	Telephone	Telephone	.56
Jan. 7	Scoggins	Gas & Oil	9.89
Jan. 7	Credit		3.00
Jan. 7	Credit		11.00
Jan. 7	Credit		1.25
Jan. 10	Denison Herald	Advertising	8.40
Jan. 10	Sinclair	Gas & Oil	11.85
Jan. 10	Donavon Boat Supply	Equipment	60.95
Jan. 5	N. B. McClure	Material & Supplies	.75
Jan. 10	Gulf Oil Corporation	Gas & Oil	7.40
Jan. 28	Credit S. S.	Motors Returned	118.80
Jan. 28	Roach—Labor	Operating Expense	5.00
Jan. 28	Postage	Office	.99
Feb. 1	Chas. Ingram	Gas & Oil	1.30
Feb. 8	Cleveland Ins.	Insurance	234.01
[fol. 273]			
Feb. 9	Geo. Clark	Material & Supplies	2.10
Feb. 25	Texoma Boat & Dock		373.13
	Total Due William Bros.		$3,281.31
Other Accrued Expenses:			
	Texas Hardware Co.	Material & Supplies	$ 1.90
	George Clarke Welding	Material & Supplies	3.80
	Chris Waltz	Material & Supplies	.70
			$ 6.40
	Total Accrued Expenses		$3,287.71

[fol. 274] DEFENDANT'S EXHIBIT 3

Form No. 12 Fee: $3.00 Filing

Filed in Triplicate

Affidavit of Payment of Amount of Stated Capital

To the Secretary of State, State of Oklahoma:

STATE OF OKLAHOMA,
County of Bryan, ss.

1. The undersigned, being a majority of the incorporators of: The Wilburn Boat Company being first duly sworn upon their oath, depose and say:

That they are a majority of the incorporators of: The Wilburn Boat Company.

2. That articles of incorporation were filed with the Secretary of State, State of Oklahoma, on July 12, 1948 and that the amount of the stated capital with which said corporation will begin business as set out in said articles is: $40,000.00.

3. That said amount of stated capital has been fully paid in.

Dated this 10th day of July, 1948.

(S.) J. F. Wilburn, L. G. Wilburn, J. H. Wilburn, Incorporators.

Filed 7-12-48.

Wilburn Cartwright, Secretary of State.

[fol. 275] Subscribed and sworn to before me this 10th day of July, 1948.

(S.) Clytie Wyatt, Notary Public. [Seal.]

My commission Expires: January 27, 1951.

DEFENDANT'S EXHIBIT 4

Being check in the following words and amounts:

The Citizens National Bank of Denison, Denison, Texas, 2-8-1949. No. 3533. Pay to the order of : H. H. Cleave-

land Agency $234.01, Two Hundred & Thirty Four & 01/100 Dollars.

Wilburn Brothers—New Way Grocery, By (S.) J. F. Wilburn.

Wanderer (Policy No. YA 28579).

(Said check on back showing to have been indorsed and paid.)

DEFENDANT'S EXHIBIT 5

Being check in the following words and amounts:

The Citizens National Bank of Denison, Denison, Texas, 8-5-1948. Pay to the order of H. H. Cleaveland Agency $419.56, Four Hundred & Nineteen & 56/100 For: Insurance on Motor Boat Wanderer from 6-9-48 to 5-22-49.

(Signed.) J. F. Wilburn.

(Said check on back showing to have been indorsed and paid.)

[fol. 276] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 277] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13956

WILBURN BOAT COMPANY, et al.,

versus

FIREMAN'S FUND INSURANCE COMPANY

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Dated November 4, 1952. Omitted in Printing

[fol. 278] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13956

WILBURN BOAT COMPANY, et al., Appellants,

versus

FIREMAN'S FUND INSURANCE COMPANY, Appellee

Appeal from the United States District Court for the Eastern District of Texas

OPINION—Filed January 29, 1953

Before Hutcheson, Chief Judge, and Borah, and Rives, Circuit Judges

BORAH, Circuit Judge:

This action is based on a policy of marine insurance and was originally instituted in the state court from whence it was removed to the civil side of the docket in the Federal District Court at Sherman, Texas, on the grounds of diversity of citizenship.

On February 25, 1949, the appellants' motor vessel Wanderer, then insured under a full marine risk policy [fol. 279] containing a fire clause, was destroyed by a fire of unknown origin while she lay afloat moored in Lake Texoma. The appellants filed a sworn statement in proof of loss, but the appellee insurance company refused to

recognize the claim because of the alleged breach of certain conditions in the policy and in consequence this action was instituted. The policy provides that the insurance shall be void in case the interest insured shall be sold, assigned, transferred, or pledged without the previous consent in writing of the assurers, and further that it is warranted by the assured that the vessel shall be used solely for private pleasure purposes and shall not be hired or chartered unless permission is granted by indorsement on the policy.

It was stipulated by and between the parties that the Wanderer was sold and transferred by the appellants J. F. Wilburn, J. H. Wilburn, and L. G. Wilburn, to the appellant Wilburn Boat Company, an Oklahoma corporation; that the vessel was not used solely for private pleasure purposes, but on the contrary was chartered and used for hire and that without the consent of the appellee the vessel was pledged by chattel mortgage on two occasions to the Citizens National Bank of Denison, Texas, and once to J. F. Wilburn and J. H. Wilburn jointly. The case was tried before the court without a jury, and after consideration of the pleadings, evidence, and the arguments of counsel the court found that a failure of performance of the terms of the contract was indisputably shown and that under the general admiralty law appellants were not entitled to recover. The controlling question presented upon this appeal is whether the trial judge rightly held that the policy is governed by the general admiralty law.

[fol. 280] Appellants claim that the contract was entered into in Texas and is subject to the statutory insurance laws of that state which prohibit a forfeiture under the circumstances here presented. More specifically, their primary contentions are that the court committed error: (1) in denying recovery under the policy because the assured encumbered the vessel without the written consent of the insurer in that such holding runs counter to V.A.T.S. Insurance Code, art. 5.37[1] which declares an "encumbrance clause"

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[1] Art. 5.37 is as follows: "Any provision in any policy of insurance issued by any company subject to the provisions of this subchapter to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any

to be null and void; (2) in holding that the assured was not entitled to recover because the vessel was hired or chartered without the written consent of the insurer in violation of the warranty of use for private pleasure purposes since there was no showing here that the use of the vessel had anything to do with the loss and absent such casual relationship, V.A.T.S. Insurance Code, art. 6.14,[2] prohibits a breach of the warranty from being interposed as a defense to a suit or to avoid the policy; (3) in failing to hold that they were entitled to recover under admiralty law and under the laws of Texas since the insurer knew or should have known that the Wanderer was being used commercially and [fol. 281] has waived the defense based on the breach of the warranty of private use and is estopped from relying thereon.

These being the issues, our first inquiry is to determine whether or not the circumstances here presented warrant the application of the law of the sea. We are in no doubt that the contract was maritime in its nature. Indeed, appellants admit that the policy was one of marine insurance and it affirmatively appears from the policy provisions that it covered the operation of the vessel on navigable waters of the United States without as well as within the State of Texas. Further, the vessel's operations were not confined to Texas waters. The trial court found that the waters of Lake Texoma (an inland lake between Texas and

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character, then such encumbrance shall render such policy void, shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void. Acts 1951, 52nd Leg. ch. 491." (Art. 5.37 is based on Art. 4890 R. S. 1925 (Acts 1913, p. 195) without change.)

[2] Art. 6.14 reads as follows: "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or applications therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. Acts 1951, 62nd Leg. ch. 491." (Art. 6.14 is based on Art. 4930, R. S. 1925 (Acts 1913, p. 194); (Acts 1927, 40th Leg., p. 48, ch. 33, § 1, without change.)

Oklahoma) are part of the navigable waters of the United States. Appellants do not challenge this finding; there is evidence to support it; and we are satisfied that the finding is correct in fact and in law. *Davis* v. *United States*, 9 Cir., 185 F. (2d) 938. It has long been the settled doctrine that navigable lakes are public waters and are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States. *Insurance Company* v. *Dunham*, 11 Wall. (78 U. S.) 1, 26, 20 L. Ed. 90; *The Genesee Chief*, 12 How. (53 U. S.) 443, 13 L. Ed. 1058. And the courts have throughout the years recognized the learned and exhaustive opinion of Justice Story in the case of *DeLovio* v. *Boit*, 2 Gall. 398, F. C. No. 3,776, affirming the admiralty jurisdiction over policies of marine insurance. *Insurance Co.* v. *Dunham, supra;* see also *Robinson* v. *Home Ins. Co.*, 5 Cir. 73 F. (2d) 3, cert. den. 294 U. S. 712, 55 S. Ct. 508, 79 L. Ed. 1246; *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 5 Cir. 49 F. (2d) 121, cert. den. 284 U. S. 628, 52 S. Ct. 12, [fol. 282] 76 L. Ed. 535. It follows that we are required to measure appellants' liability by the standards of the maritime law even though the proceeding was instituted in a common law court. See *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171.

Applying the rules of the numerous cases which have recognized the necessary dominance of admiralty principles in actions in vindication of rights arising under admiralty law, we hold that because of their admitted breaches of this contract assureds may not recover on it. Under general maritime law, contracts of insurance must be enforced as written and this court, in common with other courts, so holds. *Home Ins. Co.* v. *Ciconett*, 6 Cir., 179 F. (2d) 892; *Robinson* v. *Home Ins. Co., supra; Aetna Ins. Co.* v. *Houston Oil & Transport Co., supra.* In *Home Ins. Co.* v. *Ciconett*, the court, in language which we approve, declared: "It is settled that a warranty in a contract of insurance must be literally complied with; that the only question in such cases is whether the thing warranted to be performed was or was not performed; and that a breach of the warranty releases the company from liability regardless of the fact that a compliance with the waranty would not have avoided the

loss. *Shamrock Towing Co.* v. *American Insurance Co.*, 2 Cir., 9 F. 2d 57, 60; *Fidelity-Phenix Ins. Co.* v. *Chicago Title & Trust Co.*, 7 Cir., 12 F. 2d 573; *Wheallon Packing Co.* v. *Aetna Insurance Co.*, 4 Cir., 185 F. 108; *Aetna Insurance Co.* v. *Houston Oil & Transport Co.*, 5 Cir., 49 F. 2d 121, 123-124. See also *Norwich Union Indemnity Co.* v. *H. Kobacker and Sons Co.*, 6 Cir., 31 F. 2d 411, 414; *Imperial* [fol. 283] *Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231. The General Admiralty Law, as shown by the foregoing cases, is applicable. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-245, 63 S. Ct. 246, 87 L. Ed. 239."

This record fully supports the finding of the trial court that the warranty of private use was breached. Appellants do not deny the breach, but insist that the insurer waived this defense and is estopped from setting it up for the reason that the Wanderer was surveyed at insurer's request while the policy was in effect and appellee knew or should have known from a plain statement in the survey report that the vessel was being used commercially and failed to cancel the policy. But what appellants overlook, and what is fatal to their contention, is that the policy provided that the waiver of any provision or condition of the contract shall be written upon or attached thereto. Such a provision is reasonable, valid and binding on the assured. *Adalian's, Inc.* v. *Fidelity-Phenix Fire Ins. Co. of New York*, 5 Cir., 81 F. (2d) 226, 227; *Aetna Ins. Co.* v. *Houston Oil & Transport Co., supra; Christian & Brough Co.* v. *St. Paul Fire & Marine Ins. Co.*, 5 Cir., 5 F. (2d) 489. And, as was rightly found by the trial court, no permission was ever granted by indorsement on the policy for use other than for private pleasure purposes. We hold that the insurer is not barred from relying upon the appellants' breach of the "use" warranty. But even if the situation were otherwise, which it is not, appellants have admitted without qualification or defense that they breached the provision in the policy against selling, assigning, transferring, and pledging the vessel. We need not therefore labor the point, as one breach is sufficient.

[fol. 284] There remains for consideration the question as to whether appellants may invoke the laws of Texas to "modify or correct" the principles of general maritime law

enunicated in the *Aetna* case. Appellants concede that the admiralty courts should continue to construe the terms found in a marine insurance policy, such as the watchman's clause, the perils of the sea clause, or any other classic marine insurance clause, provided, that the federal decisions do not conflict with the regulatory insurance statutes of the several states. They contend that "the issue in this case is not whether general admiralty law applies in construing the terms used in marine policies or whether or not an admiralty court has jurisdiction over marine insurance litigation", but that "the question here presented is whether or not general admiralty law supersedes and overrides the insurance statutes of the State of Texas regulating the insurance business conducted within the state". We are no more impressed by this argument than was the trial court. Taking appellants' contentions as we find them, and deciding the case, as we should, upon principles of admiralty and maritime law rather than upon the common law of Texas as amended by statute, we are of opinion that the hostile conflict which appellants claim here exists and which indubitably does exist precludes the applicability of the state law.

It is clear from the authorities that state law is admissible to modify or supplement admiralty and maritime law only when the state action is not hostile to characteristic features of the maritime law. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834; *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 251, see *Just* v. *Chambers*, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903. The [fol. 285] following cases upon which appellants rely are but some of the instances in which the courts have held that state law, as construed and applied, did not interfere with any characteristic feature of the maritime law. *Just* v. *Chambers*, *supra*; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. These cases are not apposite. It is the settled doctrine that a marine contract of insurance is "derived from" is "governed by", and is a "part of" the general maritime law of the world. *Insurance Co.* v. *Dunham*, *supra*. A cause of action on a marine insurance policy is a cause of action in admiralty and when it is asserted in a court of law its substance is unchanged. *Panama Agencies Co.* v. *Franco*, 5 Cir., 111 F.

(2d) 263, 266. The right of a common law remedy so saved to suitors does not include attempted changes by the states in the substantive admiralty law. *Cushing* v. *Maryland Cas. Co.*, 5 Cir., 198 F. (2d) 536, 538. There is and can be no doubt that this suit which challenges the validity and effect of the terms of a marit'me contract does involve a characteristic feature of substantive admiralty law. Therefore the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by Texas courts have no application to the present situation.

In support of appellants' relat ! contention that the Texas laws on which they rely are regulatory in nature, *Hooper* v. *California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297, is cited as authority for the proposition that a contract of marine insurance is not within the regulatory power of Congress under the commerce clause of the constitution and therefore is subject to state regulation. Acknowledging that the *Hooper* case was overruled in *United* [fol. 286] *States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, appellants argue that the earlier decision was reinstated by the McCarran Act of March 9, 1945, 15 U. S. C. Sec. 1011, 1012, in which Congress declared that the business of insurance shall be subject to the laws of the states which relate to the regulation or taxation of such business. We think otherwise and are of the opinion that the McCarran Act was passed to meet the *South-Eastern Underwriters Assn.* case and that the Act only concerns the power of Congress to sustain existing and future state legislation from attack under the commerce clause of the Constitution. *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 66 S. Ct. 1143, 90 L. Ed. 1342. However, and what is here important, is that admiralty and maritime law does not depend for its effect upon the power of Congress to regulate commerce. *Knickerbocker Ice Company* v. *Stewart*, *supra*; *The Belfast*, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266; *The Genesee Chief*, *supra*. We are clearly of opinion that the *Hooper* case and the McCarran Act have no application here, and, if more need be said, the *Hooper* case does not involve a conflict between state law and the law of admiralty and cannot aid appel-

lants even if, as they contend, it has been revived by the McCarran Act.

The other contentions raised by appellants have been carefully considered but do not merit discussion. The judgment was right and it is

Affirmed.

[fol. 287] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 13956

WILBURN BOAT COMPANY, et al.,

versus

FIREMAN'S FUND INSURANCE COMPANY.

JUDGMENT—January 29, 1953.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Wilburn Boat Company, and Others, and the surety on the appeal bond herein, Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 288] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 285] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

WILBURN BOAT COMPANY ET AL., Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.